



Accountability and Transparency at ICANN: An Independent Review

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Accountability and Transparency at ICANN

An Independent Review

Final Report
October 20, 2010



Berkman

The Berkman Center for Internet & Society
at Harvard University

Executive Summary

1. Problem Statement

In recent years, ICANN has taken important actions—ranging from significant policy changes to formal reviews—to improve its accountability, transparency, and the quality of its decision making. Despite considerable efforts and acknowledged improvements, ICANN continues to struggle with making decisions that the global Internet community can support.

The manifold challenges for ICANN, often summarized under the conceptual umbrella of accountability, derive in large part from its grounding in a variety of diverse institutional models.

Functionally, ICANN performs many different roles, including technical coordination roles, some of which are analogous to those of a standards body, and in domain name allocation, a quasi-regulatory role. ICANN is charged with taking a fiduciary role that is responsive and responsible to a broad range of stakeholders, including private sector actors and global Internet users. It also receives input, advice and sometimes pressure from governments. ICANN has a mandate to follow a bottom-up, consensus-based model. It is also a nonprofit corporation governed by California law. Hence, ICANN is not supported by, nor does it lend itself to, a single traditional theory of accountability. ICANN's current liability- or sanction-based accountability mechanisms, for instance, are weak; there are no binding appeal mechanisms and no direct mechanisms for replacing leadership. In lieu of stronger liability-based mechanisms, ICANN relies heavily on transparency and public participation to foster accountability.

2. Independent Review of Transparency and Accountability at ICANN

As part of a larger independent review process, faculty and researchers from the Berkman Center for Internet & Society have taken on the challenge of researching ICANN's current efforts to improve accountability via mechanisms of transparency, public participation and corporate governance, and of analyzing key problems and issues across these areas.

ICANN has committed in its Affirmation of Commitments (AoC) with the United States Department of Commerce to “maintain and improve robust mechanisms for public input, accountability, and transparency so as to ensure that the outcomes of its decision making will reflect the public interest and be accountable to all stakeholders” and to undergo regular review by an independent Accountability and Transparency Review Team (ATRT). This research report informs the work of the ATRT, which is charged with assessing ICANN's execution of its commitments under the AoC.

The report reflects two months of research and is comprised of three detailed case studies (gTLDs, .xxx, DNS-CERT), interviews, and a review of a wide variety of secondary materials including ICANN documents and prior academic work.

We note that ICANN’s present approach to accountability is the subject of considerable criticism. The scope of this report does not provide a comprehensive survey of the ways in which ICANN’s current accountability scheme would compare with possible future alternatives. Instead, this report, within the scope defined by the AoC and ATRT, offers an analysis and assessment of three pillars of ICANN’s current accountability approach—transparency, public participation and Board governance—and provides recommendations designed to improve accountability through these three mechanisms.

3. Findings and Assessment

In-depth research into the three focus areas of this report reveals a highly complex picture with many interacting variables that make fact-finding challenging and also render simple solutions impossible. With this complexity in mind, and referring to the main text of the report for a more granular analysis, the findings and assessments of this report can be condensed as follows.

ICANN’s performance regarding transparency is currently not meeting its potential across all areas reviewed and shows deficits along a number of dimensions. It calls for clearly defined improvements at the level of policy, information design, and decision making.

Although ICANN is highly transparent in some facets of the organization, a review of ICANN’s transparency policies and practices reveals deficits related to active transparency (the mechanisms that are used to deliver structured information), passive transparency (the means by which stakeholders can request information from ICANN), and participatory transparency (the approaches that encourage active involvement and dialogue with ICANN). Transparency issues stem from the ways in which a massive amount of information is presented; the lack of clear information about methods to obtain unpublished information; overly broad transparency exemptions regarding document requests; and the lack of a transparency audit.

ICANN has made significant progress in improving its public participation mechanisms and gets high marks regarding its overall trajectory in this regard. Remaining concerns about the practical impact of public participation on Board decisions are best addressed by increasing visibility and traceability of individual inputs, in order to clarify how these inputs ultimately factor into ICANN decision-making processes.

This report recognizes ICANN’s previous and ongoing efforts to improve public participation mechanisms. Our review also shows a pervasive perception among various stakeholders that they are not “being heard” by the ICANN Board despite increasingly sophisticated mechanisms and tools of participation. This report’s analysis identifies the potential for improvement in soliciting public input; summarizing, aggregating and acknowledging public contributions; clarifying how public input is reflected in Board decision making; and enhancing the structure and timing of cross-community interactions.

ICANN’s greatest challenge ahead, despite significant recent efforts, remains corporate and Board governance. Proposed measures identified in this report aim to increase efficiency,

transparency and accountability within the current context and in the absence of standard accountability mechanisms.

Echoing the concerns of stakeholders and scholars, this report identifies several issues that fall under the rubric of corporate governance. Board governance in particular is a principal instrument in ICANN's toolbox to strengthen its accountability, with strong implications for organizational culture and values. This report's review of a broad range of issues raised by the community has led to the identification of key issues and shortcomings in areas such as Board composition; Board-staff interaction; the Board's interaction with constituent bodies; transparency of decision making; and the processes by which Board decisions can be challenged and reviewed.

4. Recommendations

There is no straightforward way to address the various challenges ICANN faces. The approach underlying this report's recommendations takes an evolutionary rather than revolutionary perspective. This approach is aimed at continually improving ICANN's accountability step by step, based on lessons learned, through a series of measured interventions, reinforced by monitoring and subsequent re-evaluation.

For each of the three focal areas covered in this report and for each of the key issues addressed, this report suggests ways in which the status quo can be improved. Some of these recommendations can be implemented quickly, others require policy changes, and still others call for more in-depth research, consultation and deliberation among the involved stakeholders.

This report's recommendations vary in kind and orientation. They encourage the adoption of best practices where available and experimentation with approaches and tools where feasible. Several of the recommendations are aimed at improving information processing, creation, distribution, and responsiveness at different levels of the organization.

Building upon findings from both the private and public sectors, the recommendations propose various tools, techniques, and actions to further strengthen ICANN's transparency, public participation, and governance mechanisms. The spectrum ranges from an overhaul of ICANN's approach to information design to an adjustment of Board selection criteria and the reconsideration of the scope of the Independent Review Panel (IRP) process.

Several of the recommendations address ICANN in its capacity as an information-handling entity. Proposed improvements in this category involve disclosure policies and document handling practices; recommendations about baseline standards for the structure and timing of public comment periods; the request for more explicit and detailed information regarding the rationale for decisions by the Board; transparency regarding Board-staff interactions; and improvements of the communication between Board and the Governmental Advisory Committee (GAC).

Following the proposed evolutionary approach, future ICANN reviews should assess the extent to which these recommendations—if implemented—have improved the status quo, and whether

or not more radical measures that are currently outside the scope of this report need to be considered, such as the introduction of a sanction-based accountability mechanism (e.g., a binding third-party review process). Finally, even the best procedures for transparency and governance rely on a commitment by Board and staff alike to put these measures into practice. Ensuring a culture of openness is a necessary complement to the structural steps recommended in this report.

Contributors

This report, written on a complex subject and on an aggressive timeline, required a coordinated team effort. Contributions to the substance of the research came from all corners and layers of the Berkman Center and our extended network, including project advisors and researchers, Berkman Center staff and summer interns, researchers from partner institutions, and peers from academia and beyond. We are deeply grateful for all of the thoughtful inputs we received and for the hard work and support of everyone involved.

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Reader's Guide

This report begins with an introductory section that articulates both the problem statement and the background of the project, and the motivation and role of the Berkman Center.

Section II introduces and frames the basic concepts that are the focal point of our inquiry—accountability, transparency, public participation and corporate governance—and describes the key theoretical frameworks and questions for each as they apply to ICANN. This section also includes the articulation of our central research questions and a description of our study methodology (additional information regarding the Berkman teams's workplan and approach are detailed in Appendices A and B).

Section III offers a summary of the approach used to identify issues for later analysis. This is followed by short summaries of the three case studies: the Introduction of New gTLDs, the .xxx Domain Case and the DNS-CERT Proposal. These case studies play a central role in establishing the factual basis for the report's analysis and recommendations. The full case studies are in Appendices C, D, and E.

The body of the report, Section IV, presents our analysis of the issues and associated recommendations in three subsections: transparency, public participation, and corporate governance. Each subsection introduces the issues, summarizes the factual observations used in the analysis, and discusses the areas deserving further attention, then provides a concise articulation of the recommendations. The Board Governance section includes analysis, discussion and recommendations related to independent review and the role of the Governmental Advisory Committee (GAC).

I. Introduction

A. Problem Statement and Background

In recent years, ICANN has taken important actions—ranging from significant policy changes to formal reviews—to improve its accountability and transparency, and the quality of its decision making. Despite considerable efforts and acknowledged improvements, ICANN continues to have problems making decisions that the global Internet community supports. The critiques cover a broad range of issues, including internal factors (how ICANN’s decision-making mechanisms have developed in response to its own internal processes and external feedback) and external factors (how stakeholders communicate with ICANN and respond to subsequent decisions), all of which occur within the context of ICANN’s unique institutional structure.

Against this backdrop, ICANN has committed in the September 30, 2009 Affirmation of Commitments (AoC) by and between the United States Department of Commerce and ICANN to “maintain and improve robust mechanisms for public input, accountability, and transparency so as to ensure that the outcomes of its decision making will reflect the public interest and be accountable to all stakeholders.”¹ Pursuant to the AoC, the Accountability and Transparency Review Team (ATRT) was selected by the Chair of the ICANN Board and the Chair of the GAC in order to perform a review of ICANN’s execution of its commitments.^{2, 3}

The ATRT initiated its review on April 12, 2010⁴ and selected faculty and researchers at the Berkman Center for Internet & Society at Harvard University (referred to as the “Berkman team”) to act as independent experts.⁵ The Berkman team was asked by the ATRT to provide its own analysis focusing on the provisions of paragraph 9.1 of the AoC, based on primary and secondary research, including a series of case studies and interviews, and to submit an independent set of recommendations to the ATRT in accordance with the Services Agreement of August 5, 2010 between the Berkman Center and ICANN.⁶ In addition, the Berkman team provided *ad hoc* inputs to the ATRT on specific research issues as further specified in Appendix A.

B. Motivation and Role of the Berkman Center

The Berkman Center was founded to explore cyberspace, share in its study, and help pioneer its development. It is committed to producing research with impact. In keeping with this mission statement, faculty, fellows, and staff members at the Berkman Center have studied ICANN and its important public policy functions since its foundation. The work under the Services Agreement is motivated by and builds upon this tradition of research and engagement, which has lasted over a decade and resulted in a series of scholarly articles, congressional testimony, and teaching materials, among other things.⁷

C. Disclosures

The Berkman Center has received USD 265,692.00 from ICANN to conduct this study, based on the budget and the terms set forth in the Services Agreement.⁸ The budget consists largely of

salaries of faculty and staff researchers, including research assistants, workshop expenses, and travel costs.

The individuals involved in the research efforts are listed in the acknowledgment page of this report. In this context, please note the following disclosures:

- Professor Jonathan Zittrain, Berkman Center Faculty Co-Director and Co-Principal Investigator of this review, is on the Board of Directors of the Internet Society (ISOC). The DNS-CERT case study produced by the Berkman team refers to a letter from Lynn St. Amour, President and CEO of ISOC, in establishing the factual basis of the case study.
- Professor Jack Goldsmith, Henry L. Shattuck Professor of Law, Berkman Center Faculty Co-Director and member of the Berkman team, has submitted testimony for ICM in the .xxx case. He provided comments on the scope and structure of an earlier version of the .xxx case study.
- Berkman Center Fellowship Advisory Board Member and Senior Researcher Wendy Seltzer is a representative of the Non-Commercial Users Constituency to the GNSO Council. She provided comments on the scope and structure of the three case studies and inputs regarding specific factual questions by the Berkman case study team.
- The Berkman Center previously worked with ICANN and its founding members to provide a venue for early meetings and—prior to the formation of ICANN itself, in 1998, and after its founding—to provide webcast and other public participation support. The Berkman Center’s formal involvement in this respect with ICANN ended after the November 2001 ICANN meeting in Marina del Ray.

II. Task Structure, Basic Concepts, Research Questions and Methodology

A. Task Structure

The Services Agreement as interpreted by the ATRT includes two related, but analytically distinct workstreams:

- (1) Between August 5, 2010 and October 13, 2010, the Berkman team served as a “sounding Board” for the work of the ATRT and its working groups and provided *ad hoc* inputs on specific research issues, especially in relation to the three case studies that the Berkman team conducted (see below).
- (2) In parallel, the Services Agreement required the Berkman team to provide its own analysis based on primary and secondary research and to submit an independent set of recommendations to the ATRT.

Appendix A outlines the Berkman team’s workplan and provides a detailed overview of the various activities and outputs associated with the respective workstreams. This report is the key deliverable and provides the Berkman team’s independent analysis and assessment within the scope of AoC 9.1 and the Services Agreement, respectively.

B. Basic Concepts: Accountability, Transparency, Public Participation, and Corporate Governance

Paragraph 9.1 of the AoC is aimed at ensuring “accountability, transparency and the interests of global Internet users” and sets the frame of reference for this report. While the areas of review are further specified in paragraph 9.1 (a–d) of the AoC, no comprehensive definitions of the key concepts *accountability* and *transparency* are provided. Any review of ICANN’s performance in these areas has to start with at least a clarification of the underlying understanding of these basic concepts as well as interacting notions such as *public participation* and *corporate governance* that play an equally prominent role in the AoC.

1. Accountability

For this report, several theories of accountability have been reviewed and their possible application to ICANN explored. The result of this effort, in summary, is that ICANN is not supported by, nor does it lend itself to, a single theory of accountability. This stems from both the lack of clarity at the conceptual level and ICANN’s hybrid institutional grounding. Despite the importance accorded to considerations of accountability for ICANN, there is neither a standard working definition of accountability nor agreement on metrics to monitor and measure progress.

ICANN's legal documents and policies do not offer a consistent and holistic accountability framework, although several documents—including the Bylaws, Annual Reports, and internal strategy papers—make reference to accountability.⁹ For instance, ICANN's Accountability and Transparency Frameworks and Principles refer to accountability and transparency as the foundations that support the corporation's operating model, and define three types of accountability:¹⁰

- *Public sphere accountability*, which deals with mechanisms for assuring stakeholders that ICANN has behaved responsibly;
- *Corporate and legal accountability*, which covers the obligations that ICANN has through the legal system and under its bylaws; and
- *Participating community accountability*, which ensures that the Board and executive perform functions in line with the wishes and expectations of the ICANN community.

Across these areas, ICANN has developed and implemented three key mechanisms aimed at implementing the accountability principles: public participation mechanisms, transparency practices, and the independent review of Board decisions.

In parallel to ICANN's interpretation of accountability, a review of academic literature and other background materials offers several other frameworks for accountability, providing additional, complementary, and sometimes competing perspectives.¹¹ Building upon earlier analyses, the various dimensions of accountability as applied to ICANN can be summarized as follows:¹²

- *Transparency* as a fundamental dimension of accountability and an instrument for assessing ICANN's performance;
- *Responsibility* as pertaining to following externally and/or internally established rules, standards, and best practices;
- *Responsiveness* as an outward-looking aspect of accountability that measures the extent to which ICANN meets the demands and needs of the constituencies it serves; and,
- *Liability* in the sense of consequences that may stem from inappropriate actions by ICANN staff and Board, e.g., third-party review, sanctions, or mechanisms to replace leadership.

The first three procedural mechanisms are well-established elements of ICANN's activities and operations and contribute to its accountability. They may act in complementary ways. For example, transparency may both serve as a check on inappropriate activities and enhance the evaluation of responsibility-based and responsiveness-based accountability. Public participation contributes to the responsiveness measure as it offers a view of community preferences.

ICANN's approach to accountability has been contested, however, particularly regarding the weakness of standard liability-based mechanisms in ICANN's current governance model. Some scholars suggest that the continuous proliferation of "new opportunities for public comment, public review, and public participation" may create a perception of accountability that is in actuality a poor substitute for more direct forms of recourse to ICANN's decision-making processes.¹³ Furthermore, some argue that ICANN's current accountability mechanisms are not

well-suited to its needs and goals, and that it is fundamentally disconnected from most of the standard accountability mechanisms that usually govern a company.¹⁴ Others have suggested that the current mechanism for independent review of Board decisions is inadequate. They argue that it does not lead to binding decisions or sanctions, is overly broad in scope, but too narrow as far as eligibility or standing is concerned (these issues are further addressed in Section IV C.2.4 of this report).¹⁵

While acknowledging the competing theories of accountability, this report does not develop a holistic theory or normative view of ICANN's accountability. The frameworks outlined above serve as reference points to build and test working hypotheses without prioritizing among the different notions and interpretations of accountability. Given the assignment and methods as specified in the AoC and the Services Agreement, this report analyzes accountability mechanisms as defined by ICANN itself and seeks to analyze and assess whether ICANN has lived up to its own commitments. The Berkman team acknowledges that taking other notions of accountability as a starting point and frame for review may lead to different and equally legitimate questions that are not addressed in this report. This report's pragmatic approach is not an implicit endorsement of one concept of accountability over the other, but is based on the specifics of the task assignment and takes into account the conditions under which this review has been performed, including significant time constraints.

2. Transparency

In this report, the Berkman team has taken a similar approach to the topic of transparency. After a review of the relevant literature on transparency concepts in the ICANN context and beyond,¹⁶ the Berkman team has focused on the analysis and evaluation of ICANN's overall transparency structure as set forth in various policies and outlined in its Accountability & Transparency Frameworks and Principles.¹⁷

Remaining aware of the hybrid institutional character of ICANN, the Berkman team borrowed from conceptual models and approaches used mainly to analyze public sector institutions in order to frame and discuss ICANN's transparency mechanisms. Though freedom of information laws and other public sector transparency models do not apply to ICANN in the same legal manner as they apply to public or governmental entities, various observers have agreed that the public sector provides useful models for evaluating ICANN's information policies.

In addressing the corporate elements in ICANN's structure, the Berkman team also took into account developments in the corporate field, where the transfer of public-sector functions to the private sector is often accompanied by imposing reporting and other transparency obligations, as well as consumer-oriented information requirements. While these and other information requirements primarily lead to information flows between corporations and regulatory bodies, in many fields corporations have developed active information policies to ensure direct communication with stakeholder constituencies.

Building upon this analytical framework, three types of transparency mechanisms can be distinguished:

- *Active transparency*: ICANN actively makes information and documents publicly available on its website.
- *Passive transparency*: ICANN provides documents upon request from members of the general public.
- *Participatory transparency*: ICANN involves the stakeholders and the general public in its decision-making processes by eliciting comments and inviting consultation, and thus shares and receives information.

Based upon the case studies and interviews, the Berkman team identified the functional role of transparency as an additional dimension for the analysis of transparency obligations as discussed later in this report. These transparency functions include:

- *Institutional transparency*: transparency regarding the processes and structures of ICANN, how various organizational elements interact, and what their respective responsibilities are.
- *Topical transparency*: the agenda, how the agenda is defined, and what falls within the scope of ICANN activities.
- *Decision-making transparency*: how decisions at ICANN are made.
- *Evidentiary transparency*: what is the evidentiary basis for decisions and how is this established.
- *Consultative transparency*: how outside input and the perspectives of constituent bodies and interested parties are incorporated into ICANN decision-making processes.

All of these transparency functions bear on the framing and performance of active transparency. Effective and clear communication about what ICANN is and does should be included among ICANN's responsibilities. These functions also bear on the performance of passive transparency. ICANN's ability to clearly answer these questions is an important measure of its openness and responsiveness. Additionally, making these processes and structures transparent and thereby accessible is an essential prerequisite for effective public participation.

3. Public Participation

The processes by which ICANN invites, summarizes, and ultimately internalizes, reflects, or rejects public input are intimately connected to the dimensions of transparency outlined in the previous section, with a particular focus on participatory transparency. Furthermore, the efficacy, timeliness, and demonstrable impact of such inputs on Board decision-making processes are undergirded by mechanisms of institutional transparency, as described above. As enshrined in ICANN's founding documents and reiterated by the AoC, effective public participation is a foundational dimension of accountability, as it ensures that the Board and senior staff perform functions in line with the wishes and expectations of the ICANN community.

A review of the literature, case studies, and public inputs suggests significant advances in public participation processes in recent years and a number of promising initiatives to further enhance

the traceability and visibility of inputs in ICANN activities and decisions. However, as numerous scholars have noted, public participation cannot be ICANN’s “chief legitimizing principle,” and may not adequately compensate for the absence of more direct or “harder” forms of accountability.¹⁸ Others argue that the correlation between decision-making accountability and public participation could be vastly improved via capacity-building and enhancing the ability of the public to meaningfully and effectively engage in technical policy decisions. As an accountability measure, public participation processes must therefore support the ability of civil society to: “(i) understand and critique technical issues, (ii) (gain) sufficient knowledge on the given structures and potentials, and (iii) (develop) sufficient skills to negotiate with more powerful actors.”¹⁹

Public participation theories also raise questions regarding the ultimate goals of such processes, and the appropriate balance between a theory of participation that is focused on soliciting an ever-broadening and diverse set of public inputs and a strategy that is focused on garnering and utilizing the most useful set of those inputs.²⁰ ICANN’s particular definition and approach to public participation—the efficacy of which is closely linked to transparency—also raises tensions. Are public input processes intended to enable stakeholders to observe, in a timely, transparent, and easily accessible way, the details and processes that factor into a decision? Or is the goal better defined as facilitating the capacity to “affect, in a meaningful fashion” that decision?²¹

This review is not intended to resolve those competing theories, nor to determine where they are truly at odds and what mechanisms might facilitate their coming together at different stages of the public input process. Rather, the analysis is focused on the visibility and traceability of an individual input from “end to end” (from initial input to relevant Board decision or ICANN activity), whether directly, as an individual’s input to public comments or forums, or indirectly, via the channels offered by the different bodies that feed into the Board’s decision-making processes. Confronting perceptions of community members that they are not actually “being heard” is fundamental to the legitimacy of public participation processes and to their intersection with effective transparency and accountability.

4. Corporate Governance

Paragraph 9.1 of the AoC makes several references that are best subsumed under the umbrella term “corporate governance.” Governance of ICANN activities spans a complex and diverse set of functional activities, ranging from strictly technical activities to the ambitious international effort to seek consensus on policy questions of global relevance. If considered separately, each of the activities undertaken at ICANN may be best supported by its own distinct model of corporate governance. Yet ICANN must reconcile all of these activities and their governance under one framework and address the associated tradeoffs. Decisions and structures at ICANN must not only take into account the efficiency and timeliness of decisions and be responsive to ICANN stakeholders but also achieve the highest standards of transparency and accountability, while operating within the legal restrictions associated with ICANN’s status as a nonprofit corporation in the state of California. Given its legal status, the Board bears ultimate responsibility over the actions of ICANN and is at the center of questions related to corporate governance, including the

composition and skill set of the Board, the selection of Board members, the allocation of responsibilities and relationship between the Board and the staff, and the level of transparency associated with Board and staff activities, communication and deliberation.

Perhaps the most contentious of the ICANN's activities is making policy decisions related to the allocation of new domain names. These decisions inevitably result in winners and losers, and the benefits and costs are not easily compared. In such cases, the ICANN Board is charged with weighing these disparate benefits and costs, which map disproportionately across different stakeholder groups. When successful at bridging and reconciling the needs of a diverse set of stakeholders, ICANN succeeds by playing an effective conflict resolution role. Lack of success may often have more to do with the structure of the dispute rather than the effectiveness of ICANN as an arbitrator. Because of the contentious nature of many ICANN decisions, the losers often level charges against the decision-making process, while the winners are not apt to point out any procedural shortcomings or factual gaps. For ICANN, both perception and substance weigh on the legitimacy of its decisions, and the governance challenge must address both.

While structure and procedures are important, so too is a culture of good governance. The success of the measures suggested in this report depend on the buy-in of the staff and Board of ICANN. A number of the suggestions presented later in this report relate to improving the abilities of the staff and Board to implement governance principles in their daily practice.

C. Research Questions

With this conceptual framing in mind, the research questions that this report seeks to answer are as follows:

- Based on case study analysis and a review of a diverse set of materials—including public comments, ICANN documents, academic studies, media reports, expert opinions, and interviews—what key issues emerge related to ICANN's mechanisms for public input, accountability, and transparency?
- Which of these issues have been or can be addressed, and by what means, in order to improve the mechanisms for public input, accountability, and transparency within the framework of the AoC?

D. Research Methodology

In accordance with the methodological principles outlined in the Services Agreement, which makes explicit reference to the case study method and requires any recommendations to be based on facts, the Berkman team has combined a number of qualitative research methodologies. These efforts include, among other things, primary research including various structured (questionnaire-based) interviews with experts and stakeholder representatives, secondary research of extensive Web and database searches, an exploratory English-language literature review, and the drafting of case studies.

The case studies have played a particularly important role in the Berkman team's work, given its mandate described in the Services Agreement. The following methods have been applied in this specific context:

- **Review of materials:** Following the multi-step methodological approach outlined in the Services Agreement, the draft case studies are structured as qualitative, exploratory case studies and based on an extensive review of a diverse range of publicly available materials, including public comments, ICANN documents, academic studies, media reports, and expert opinions. The review started with a mapping of public submissions from January 2008 to June 17, 2010 and included, among other things, extensive Web and database searches aimed at identifying case-specific materials from various sources, including ICANN's website. Each case study provides detailed references to such specific materials in the footnotes.
- **Interviews:** In addition to publicly available sources, the draft case studies are informed by observations of the selected group of stakeholders and experts who were interviewed in the course of developing the case examples. These interviews provide an important supplementary factual basis for this report because they convey observations regarding the perception and interpretation of ICANN decisions by the broader community. The statements of interviewees do not reflect the opinions or conclusions of the Berkman team. The interviews were conducted on the condition of confidentiality; in the case of the questionnaires to GAC members, respondents were asked to specify whether they wished their answers to remain confidential. All ICANN staff interviews were coordinated internally within ICANN and the responses to the questionnaires were aggregated by ICANN's Advisor to the President, Denise Michel. ICANN's General Counsel, John Jeffrey attended the phone interviews with ICANN staff members at his own request. For more details, see Appendix B.

The review of publicly available materials, case studies, and interviews have been supplemented by a series of internal memoranda written by faculty members looking into public participation mechanisms, transparency issues, corporate governance issues, and the Independent Review Panel mechanism. All materials (except the confidential interviews) have been collected and will be made publicly available in January 2011 in order to support and encourage future research efforts.

III. Issues Identification and Issue Clusters

A. Approach

The mandate mentioned above, which requires the Berkman team to provide recommendations that are exclusively fact-based, is interpreted in the context of this final report such that:

- issue identification must be based on facts and observations;
- issue analysis must take into account the current context in which ICANN operates, including ICANN’s institutional framework (e.g., applicable provisions in the Bylaws and policies); and that
- considerations and recommendations are supported by these observations, and also take into account ICANN’s previous efforts aimed at addressing the respective issues.

The case studies summarized in the following section play a key role within this multi-pronged fact-based approach.²² They have guided the identification of key issues, including challenges and opportunities, as well as the discussion of possible improvements. In addition to the case studies, we have identified and analyzed issues put forward based on a review of publicly available materials, interviews, and the internal policy-oriented memoranda.²³

B. Summaries of Case Studies

1. The Introduction of New gTLDs

In June of 2008, the ICANN Board unanimously adopted the GNSO’s policy recommendations for the introduction of new generic top-level domain names (gTLDs) and resolved to begin work on the implementation of a new gTLD application process. The new program, initially scheduled to launch in September 2009, is still under development.

The proposed process has been fraught with controversy, including criticisms over its delays, whether ICANN’s method of publishing and incorporating public comments is sufficiently transparent and responsive, and whether new gTLDs should even exist. Critics have also raised a number of specific substantive issues, including the Expression of Interest proposal, trademark protection, the role of the Governmental Advisory Committee, the proposed morality and public order standard for objections to new gTLDs, and vertical integration.

2. The .xxx Domain Case and ICANN Decision-Making Processes

In 2000, ICANN initiated a “proof of concept” stage to begin the adoption of new generic TLDs. ICM Registry unsuccessfully proposed .xxx and .kids. In 2003, after some exchanges with ICANN regarding its first proposal, ICM submitted a revised bid for the creation of .xxx for ICANN’s call

for sponsored TLD proposals. The ICANN Board adopted a resolution to begin negotiating the commercial and technical terms of a registry agreement with ICM in June 2005; however, under pressure from a variety of constituencies, ICANN reversed its decision and denied ICM's proposal in 2007. ICM filed a request for Independent Review in 2008—the first such request to be heard before the Independent Review Panel (IRP) in ICANN's history. In 2010, a three-person panel of arbiters (which comprised the IRP) decided in favor of ICM.

This case study outlines the key events surrounding the .xxx proposals from 2000 to June 17, 2010, without re-examining the merits of the application itself. This chronology is designed to examine two specific dimensions of the .xxx process: (1) the role of the Independent Review Panel (IRP), and (2) the interaction between the Governmental Advisory Committee (GAC) and the ICANN Board during ICANN's evaluation of the ICM .xxx proposal, registry agreement negotiations with ICM, and ultimate rejection of ICM's application.

3. The DNS-CERT Proposal

ICANN's DNS-CERT proposal advocates the creation of an organization to analyze, assess, and respond to global DNS security threats. This case study begins with an overview of ICANN's DNS security mandate as described in its Memorandum of Understanding with the United States Department of Commerce, its Bylaws, and its 2009 AoC. A summary of the DNS-CERT proposal follows, based on ICANN's "Proposed Strategic Initiatives for DNS Security, Stability, and Resiliency" and its "DNS-CERT Business Case." The study then traces the origins of the controversy surrounding the DNS-CERT proposal, beginning with ICANN's publication of the proposal and the remarks made in Nairobi by its CEO, Rod Beckstrom, and the controversy's development through public comments, correspondence, and material gathered in interviews with the DNS community.

The review of these materials suggests three key issues underlying the controversy: (1) the merits and clarity of ICANN's assessment of the current state of DNS security and its proposal for the creation of a centralized CERT; (2) varying interpretations of ICANN's DNS security mandate; and (3) procedural issues related to openness, transparency, public input, and stakeholder participation.

C. Issue Clusters

The analysis of the three case studies and additional case examples, together with an in-depth review of various other materials (including ICANN's policies), suggests a diverse range of issues that, to varying degrees, are associated with ICANN's mechanisms for accountability, transparency, public participation, and corporate governance. Some of these issues are structural, while other concerns are related to the substance of ICANN's work; still others relate to the ways in which decisions are made or information flows. The following typology provides one way to cluster such issues. Admittedly, categories are made, not found—thus, several

different ways exist to map the issues that have been identified in the review of the above-mentioned materials. The following three categories can be distinguished:

- *Structural issues:* Structural issues are related to what one might describe as the “DNA” of ICANN as it manifests itself today. This category includes not only ICANN’s legal structures as a California-based nonprofit corporation and its mission statement, but also its basic organizational structure: the different bodies, such as the Board of Directors, Ombudsman, Independent Review Panel, and Supporting Organizations, as well as the ways in which the Bylaws define the interfaces among these bodies.
- *Procedural issues:* Analytically distinct from structural issues are issues related to procedures within a given institutional framework. Issues in this category include concerns about the ways in which decisions are made within a given structure (e.g., clarity, timeliness, or predictability of decisions) and when and how information flows, and at what quality, between the different ICANN constituencies and bodies. The interaction between the GAC and the Board is one example in this category; the question of (active) disclosure of information or the ways in which exceptions are administered in the context of disclosure requests is another.
- *Substantive issues:* A third category of issues concerns the substance of ICANN activities and decisions. Typically, such issues concern the outcomes and merits of ICANN’s decisions. An example is the disagreement about the ways in which the ICANN Board evaluates certain risks (e.g., in the context of the current state of DNS security).

These three clusters are analytically distinct but may interact with each other in multiple ways. The structural framework (how ICANN is set up), for instance, shapes the need for and character of procedures, which in turn have an important impact on the outcomes of decisions. The case studies and the review of the other materials suggest that the three types of issues are almost inextricably linked. The critique of a particular decision by the ICANN Board, for instance, may be rooted in a different take on the substance, but then expressed by way of claims about process deficiencies (e.g., lack of consideration of public input) or with reference to ICANN’s foundation (e.g., its hybrid nature).

Although the clusters interact in multiple ways, it is important to separate them in order to identify, analyze, and address the underlying challenges. This report focuses primarily on procedural issues, although it also addresses selected structural issues. Substantive issues are flagged in the context of the case studies but excluded from further analysis since these fall outside of the scope of the Services Agreement. It is important to note that issues identified across the three clusters include contested issues as well as issues of perception. To the extent that such issues have crystallized and are expressed in the materials the Berkman team has reviewed, they need to be addressed in appropriate ways, for example, by balancing information asymmetries in case of “mere” perception issues, regardless of their substantive merits.

D. Selection and Overview of Key Issues

Within each cluster, the Berkman team has selected a set of key issues. Such a reduction of complexity requires qualitative judgments. For this report, the criteria for these judgments (or “filters”) are derived from paragraph 9.1 of the AoC. With these qualitative guidelines in mind, the identification and selection of issues has been informed by the interviews conducted by the Berkman team and has been shaped, but not determined, by helpful interactions with ATRT.

Based on these interactions, and looking at the issues mentioned in the previous section through the lens of paragraph 9.1 of the AoC, the following cluster matrix emerges:

	Structural	Procedural	Substantive
Transparency (cross-sectional): AoC 9.1	<ul style="list-style-type: none"> • Transparency audits 	<ul style="list-style-type: none"> • Information requests • Exemptions • Information design (active transparency) 	OUTSIDE OF SCOPE OF REVIEW
Public Participation, including public input mechanisms (cross-sectional): AoC 9.1 and 9.1(c)	<ul style="list-style-type: none"> • Incorporating public input into ICANN decisions • Need for enhanced cross-community dialogue 	<ul style="list-style-type: none"> • Eliciting Public Input • Aggregating and Responding to Public Input 	
Board Governance, including the IRP and selected GAC aspects: AoC 9.1, 9.1(a–b)	<ul style="list-style-type: none"> • Board composition • Independent review of Board decisions 	<ul style="list-style-type: none"> • Transparency of Board decision making • Board-Staff interaction • Definition of GAC advice • Board-GAC interaction 	

The following section addresses all of these key issues, starting with the cross-sectional thematic areas as set forth in paragraph 9.1 of the AoC—transparency and public participation (including public input mechanisms)—followed by more specific issues related to Board governance and role of the GAC as specified in 9.1 (a–b) of the AoC.

IV. Key Issues Analysis and Discussion

The exploration of the key issues mapped above adopts the following scheme: in a first step, each cluster of issues is put into context by providing some general considerations, which may address conceptual questions or introduce bigger picture observations and definitional elements. In a second step, individual issues within each cluster will be explored one by one. The exploration starts with a concise definition of the issue, supported by factual observations and followed by a discussion section, which feed into concise recommendations.

It is important to understand that this issue analysis and discussion is the summary of a much larger, in-depth research effort which includes several hundred pages of case studies, case examples, memoranda, a literature review, charts of public submissions, and many other documents. Some of these materials are included in the Appendices; others will be made available online in the future.

A. Transparency

1. General Considerations

ICANN's heavy reliance on transparency for establishing and maintaining accountability is an issue that came up repeatedly in our research and interviews and is central to all of the observations and recommendations in this report. This is partially a reflection of ICANN's unusual institutional standing and the associated limits to the application of alternative accountability mechanisms.²⁴ It is also a reflection of ICANN's international fiduciary obligations and its public interest orientation to serve the demands and needs of the international Internet community.

This reliance on transparency also derives from the necessity of balancing the needs and interests of a diverse set of stakeholders. ICANN's decisions, by design, often disproportionately favor and disfavor different segments of ICANN's constituency. The issue of transparency-based accountability is most salient when considering difficult decisions made at the Board level, which often requires balancing a complex set of incommensurable facts and is frequently accompanied by substantial uncertainty. This key dynamic is introduced in this section and carried through to the sections on participation and corporate governance; distinct but related recommendations are offered in all three sections.

From a longer-term perspective and beyond the specific review framework of the AoC, the Berkman team suggests working towards a comprehensive concept of transparency grounded in a transparency- and participation-oriented management approach to information and document creation, processing and communication, and ultimately integrating these different facets of transparency into a comprehensive adjusted institutional communication concept.

Transparency is a cross-sectional issue that plays a specific role in accountability, public participation, corporate governance and decision making. The following section addresses

ICANN's transparency policies and practices. The particular relationship of transparency to public participation is addressed in a latter section; the influence of transparency in decision making is taken up separately in the corporate governance section.

2. Issue-Specific Observations and Recommendations

2.1 Information Design

(a) Issues

ICANN publishes a great amount of information on its website. Comments suggest, however, that this is not a sufficient approach to active transparency. Several observers have pointed out that the information available is not always structured in ways that are helpful to the community and in some instances may even cause "information overload."

(b) Observations

ICANN proactively publishes certain categories of information considered to be of key importance for the ICANN process on its website. Over 20 different categories of publicly available information are listed in the Documentary Information Disclosure Policy (DIDP).²⁵ Interviewees expressed concerns that ICANN publishes an avalanche of details but fails to make information public at a higher level, for example by failing to state clearly its goals and priorities and the rationale behind major Board decisions. Interviewees suggested that clear, regular progress reports stating what decisions have been made and why, what the upcoming priorities are, and what ICANN hopes to accomplish, would help improve transparency.

ICANN has taken action to address some of the community's concerns. In July 2006, ICANN announced it would be revamping its website to increase accessibility and better meet users' needs.²⁶ Several changes have since been introduced, including search functionality and RSS feeds and a redesign of the site's front page. In June 2009, ICANN conducted a usability survey to determine what additional changes needed to be made.²⁷ In October 2009, ICANN revealed plans for a full redesign on its blog, including screenshots, results from the survey, and an independent site audit.²⁸ This redesign has not yet been implemented, but is still a priority item on the ICANN staff agenda, according to interviewees. In addition, ICANN staff have experimented with a wiki format that includes "searchable wiki pages to provide the public with easy-to-access information on every substantive resolution approved by the Board of Directors."²⁹ According to interviewees, this process will soon be completed. The wiki currently presents Board resolutions from 2009 by category (e.g., gTLDs or Administration & Budget), though it is not editable or interactive, contrary to what one might expect from a wiki (the wiki references an "Add Comment" box that appears to be missing).

(c) Discussion

The review of policies and practices demonstrates that ICANN's active transparency approach has been largely based on providing documents as lists of links on its website, with navigation tools such as topical clusters, keywords, and search. Such information design choices have an

impact on transparency. The effective accessibility of the material to the interested public at large as well as occasional and new users—as opposed to specialized and experienced ICANN professionals—needs improvement in order to better perform the various information functions identified above.

ICANN can further improve its information and document handling by adopting procedures and best practices from the public and corporate sectors. For example, incoming and internally generated documents could be tagged to denote their level of public accessibility (classification). These tags would then be regularly reviewed within the life cycle of each document. This would help to build an experience-based disclosure policy and facilitate the flow and accessibility of information in the context of active, passive, and participatory transparency.

Furthermore, ICANN would benefit from an upgrade and redesign of its website in a way that takes into account all the previously described dimensions of transparency. Other tools and design elements may include: document tagging techniques; a clear inventory of documents provided upon ICANN's initiative; documents that are structured in a user-friendly manner; clarifying and better communicating the procedures for requesting and obtaining unpublished information, such as a flowchart-like description of the conditions and procedures, including review procedures; a diagrammatic *general description* of participatory procedures related to decision making; and a specific flow chart with an up-to-date map of the participatory procedures that are currently underway. Upgrading the website is not only a question of aesthetics; it is a precondition to effective transparency.

(d) Recommendations

- Improve information and document handling by adopting procedures and best practices from the public and corporate sectors.
- Redesign ICANN's website to promote, facilitate, and leverage the active, passive, and participatory aspects of transparency.

2.2 DIDP Requests (information/document requests from ICANN by members of the general public)

(a) Issues

While ICANN's transparency framework includes the possibility to request information that is not made publicly available, the conditions and procedures of passive transparency are not clearly communicated to the community. Furthermore, the limitations set forth in the procedures for reviewing decisions to deny information requests may have a negative impact on transparency and accountability.

(b) Observations

Any member of the public may request information that is not made publicly available (passive transparency). These requests are embedded in a special procedure set forth in ICANN's Documentary Information Disclosure Policy (DIDP). According to the DIDP, ICANN is not

required to compile information summaries or respond to requests for information that is already publicly available. Both the DIDP and the ICANN Bylaws state that translations of documents may be possible.³⁰

Comprehensive statistics and other information—as part of a transparency audit—about the quality, frequency, and responses to information requests are not publicly available. According to interviews and a review of various materials, only a small number of *formal* DIDP requests have been filed since the mechanism has been introduced, despite anecdotal evidence that suggests a larger number of *informal* requests for more information. It might also suggest that the current mechanism for communicating the availability of this information request facility is insufficient. The responses to such requests are made available on ICANN’s website; of 13 formal requests that have received responses, 7 have been fully or partially denied based on various exemptions listed in the DIDP.³¹

(c) Discussion

A review of ICANN’s passive transparency policies identifies two main problem areas that deserve further investigation. First, the ways in which the conditions and procedures of passive transparency are communicated; and second, the limitations set forth in the review procedures for information requests that are not approved.

In particular, ICANN’s website does not provide clear information on this alternative method of obtaining information from ICANN. A clear description of the conditions and procedures to access information that ICANN has not otherwise published or made available would make an important contribution to passive transparency. Regarding the second aspect, if a public request for information is refused by ICANN, the DIDP states that a requestor may appeal the denial through the Reconsideration Request procedures or Independent Review procedures *to the extent applicable*. However, contrary to public-sector practices where the mere refusal of access is sufficient to request a review by either a court or another mechanism, both the Reconsideration Request and Independent Review appeal procedures are only available to persons who have been “materially affected” by an adverse decision. (This reference leads to a problem in interpreting what is meant by “materially affected,” especially in the light of Article IV Section 2.1 of the Bylaws versus Section 2.2, which states more generally that those who “have been adversely affected by” an ICANN action or inaction may request a review.)

(d) Recommendations

- Provide clear and easily accessible information about the terms and procedures to obtain information from ICANN that has not already been made publicly available.
- Develop less restrictive and more independent mechanisms for the review of cases where information requests are refused.

2.3 Exemptions

(a) Issues

ICANN's transparency commitment is subject to a significant set of exemptions that apply to active, passive, and participatory transparency. Due to the lack of a transparency audit, it is difficult to assess the use of the exemptions. However, the review of the exemption policies leads to several concerns, including concerns related to specific exemptions and the broadness of a "catch-all" transparency exemption.

(b) Observations

The set of transparency exemptions is listed in the DIDP under the title "Defined Conditions for Non-Disclosure." According to these rules there is no or only limited transparency where ICANN has "identified . . . conditions for the nondisclosure of information."³² Such conditions comprise about a dozen categories of information, including information that has been exchanged with governments or international organizations under the expectation of confidentiality; internal information and information exchanged with entities with which ICANN is cooperating that would compromise or would be likely to compromise ICANN's internal decision-making procedures; confidential business information and/or internal policies and procedures; and drafts.

ICANN may override these exemptions "under the particular circumstances [in which] the public interest in disclosing the information outweighs the harm that may be caused by such disclosure."³³ For areas outside the exemptions listed in the above-mentioned document, ICANN installs an additional "catch-all" exemption: "ICANN reserves the right to deny disclosure of information under conditions not designated above if ICANN determines that the harm in disclosing the information outweighs the public interest in disclosing the information."³⁴

(c) Discussion

Although ICANN's hybrid organizational structure differentiates it from public entities, ICANN's practices and procedures for deciding which information to actively share with the public or for denying information requests can still be compared to other transparency regimes, including a set of representative freedom of information laws. This is not meant to imply that such laws apply in the same legal manner as they would apply to public or governmental entities. Rather, ICANN, the GAC, and external observers have agreed that the public sector provides a useful model for evaluating ICANN's information policies. An in-depth comparison of ICANN's transparency exemptions with a set of selected international freedom of information regimes leads to the conclusion that ICANN's list of exemptions is fairly comprehensive, while each of the exemptions is described in rather general terms. This observation particularly applies to exemptions protecting drafts and internal decision-making processes.

Some of ICANN's exemptions stand out as singular in their broadness, such as protecting internal policies and procedures, the exclusion of frivolous use, and financial information not publicly disclosed, and seem to be driven by a defensive approach towards transparency. At least some of these exemptions, in particular the protection of internal deliberation processes and the role of

drafts, should be narrowed in order to strengthen ICANN’s transparency, especially where decision making is concerned.

The overall “public interest override,” which is itself quite general, may provide an opportunity to counterbalance the broadness of the exemptions, if used properly. There is no information to evaluate the use of this override due to the lack of a transparency audit. The “harms test” override, however, with which ICANN gives itself authority to withhold information even when none of the exemptions apply, may obviate the purpose of formulating exemption policies altogether.

(d) Recommendation

- Narrow transparency exemptions regarding internal decision-making processes and drafts. Eliminate the catch-all transparency exemption in the DIDP.

2.4 Transparency Audit

(a) Issues

The lack of a comprehensive audit of ICANN’s information activities makes it difficult to assess its practices across active, passive, and participatory transparency.

(b) Observations

The 2007 One World Trust review describes an ICANN initiative “to conduct an annual audit of standards of accountability and transparency, including an audit of the commitments made in these Management Operating Principles . . . by an external party” with the results of the audit “published in the Annual Report.”³⁵ The last annual report does not contain such an audit.

(c) Discussion

ICANN currently lacks an up-to-date, publicly available transparency audit. This makes it difficult to make substantive assessments of ICANN’s practices as they relate to active, passive, and participatory transparency. The lack of empirical material (e.g., on the time delays in the publication of documents) currently forces reviewers to look for conceptual, structural, and procedural deficiencies in order to identify if, where, and how there are inconsistencies between guiding policies and practices. A comprehensive audit, in contrast, would allow for periodic, facts-based, internal and external reviewing and benchmarking; ICANN could greatly benefit from this when further improving its information policies.

Such a transparency audit needs to be governed by clear policies and processes, which set forth the categories of information pertinent to such an audit, among other things. Following an earlier recommendation by the One World Trust review, the transparency audit should be published in the Annual Report. In addition, the Berkman team suggests that the underlying data be released as part of the Dashboard/ICANN Performance Metrics.³⁶

(d) Recommendation

- Create and implement policies and processes for conducting and communicating regular transparency audits.

B. Public Participation

1. General Considerations

Public participation is central to ICANN’s identity. The participatory ethos of the early Internet, exemplified by democratic and consensus-driven technical bodies, is embedded in ICANN’s DNA, from its organizational structure and early history to its stated principles.³⁷ An ambitious “experiment in democratic governance on a global scale,” ICANN seeks to include the public—the global Internet user community, the private sector, governments, and other stakeholders—in its decision-making processes.”³⁸

ICANN’s commitment to public participation is clearly stated in its Bylaws: the fourth of its core values is “seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision making.”³⁹ Article III requires ICANN to provide notice and allow for public comment on any policies under Board consideration “that substantially affect the operation of the Internet or third parties, including the imposition of any fees or charges.”⁴⁰ These basic commitments are implemented and further specified in ICANN’s Accountability and Transparency Framework & Principles⁴¹ and Document Publication Operational Policy.⁴²

In the AoC, ICANN has committed to “maintain and improve robust mechanisms for public input . . . to ensure that the outcomes of its decision-making process will reflect the public interest and be accountable to all stakeholders.”⁴³ In recent years, ICANN has embarked on a number of projects and initiatives aimed at improving relevant opportunities and mechanisms. The following actions, among others, are noteworthy:

- ICANN’s “New Bylaws,” approved on December 15, 2002, introduced a staff position responsible for “coordinating the various aspects of public participation in ICANN, including the website and various other means of communicating with and receiving input from the general community of Internet users.”⁴⁴
- The Board Public Participation Committee, created in November 2008, enshrines ICANN’s commitment to effective public input at the Board level. In 2010 it contributed to the development of a more standardized approach to remote participation in the ICANN meeting in Nairobi⁴⁵ and held two online information sessions on ICANN’s plans for public participation. The committee’s next goals along similar lines are outlined in its plan for 2010–2011.⁴⁶
- Another ongoing process includes the work of the Policy Development Process Work Team (PDP-WT), initiated in 2008 as part of the GNSO Improvements process. The team’s Initial Report, published in May 2010, contains proposals regarding operating principles, rules and procedures for a new policy development process. The anticipated

next step for the PDP-WT will focus on an implementation and transition plan for their recommendations.

- Also within the GNSO, the Communication and Coordination Team (CCT)—chartered in March 2009—is tasked with improving the GNSO’s website and its ability to solicit meaningful public input, among other things.⁴⁷ In June 2010, the GNSO Council approved the CCT’s final report and directed GNSO staff to begin implementing its recommendations.⁴⁸

Despite these marked and generally acknowledged process advances, however, stakeholders and scholars alike suggest that the practical impact of public participation on actual Board decisions remains limited. While ICANN gets high marks regarding the overall trajectory of its public participation processes, increased visibility and traceability of an individual input from “end to end” (from initial input to relevant Board decision or ICANN activity) may help to confront pervasive perceptions of not actually “being heard.” Early engagement with relevant constituencies and clearer timelines for inputs may also facilitate this process.

Continued experimentation with new methods and channels for soliciting, summarizing and reflecting public input, can also present new opportunities for broader and more efficient public participation processes. ICANN’s use of a survey tool as part of its consultation process for the development of its July 2010–June 2013 Strategic Plan is a particularly salient example, as is the trial approach to inputs into the Draft Applicant Guidebook.⁴⁹ Emerging models from other organizations, such as the EU Rulemaking and Wikimedia Open Strategic Planning, may also provide useful analogs to draw upon.⁵⁰ Open innovation literature and principles also provide useful frameworks; while there are both benefits and trade-offs associated with public participation, effective participation practices can confer legitimacy on and support for decision-making processes and results, if participants feel they have been fairly heard.⁵¹

Many of our key findings from both the case studies and the interviews focus on direct mechanisms for community representation, such as input to public comments and public forums. However, these recommendations also have relevance for “indirect representation”—an individual’s input via the various supporting and advisory bodies—and in particular, through stakeholder groups in the GNSO Council. Findings related to the visibility and traceability of an individual input must also apply to these channels.

Against this backdrop, the following issues analysis focuses largely on public participation in terms of individuals and entities providing comments, with a smaller focus on representation by, or direct involvement in, various supporting organization and advisory committee activities. The Berkman team’s analysis centers on the primary steps that channel an individual’s contribution: 1) eliciting input; 2) aggregating and responding to it; and 3) incorporating it into Board decisions. In the final recommendation, we focus on early engagement with various constituencies via cross-community dialogue.

2. Issue-Specific Observations and Recommendations

2.1 Eliciting Public Input

(a) Issues

Issues related to the volume, structure, and timing of ICANN’s forums for public input can be a barrier to effective and meaningful participation. Lack of consistency regarding the accessibility (in both language and clarity) and structure (ease of navigation) of participation mechanisms can also prevent public input.

(b) Observations

As noted above, ICANN has made a number of improvements in the opportunities it offers for public input. Interviewees indicated that the new gTLD process has been significantly more consultative than previous ICANN policy decisions. ICANN has also begun offering distance learning regarding key ICANN policy initiatives; its fellows program is a noted outreach priority of the CEO.⁵² Considerable progress has been made to improve remote participation options for both public forums and other meetings via chat rooms and live audio feeds.⁵³

Despite these advances, interviewees expressed concerns that ICANN’s public meetings are less inclusive than they should be—locations are announced too late to allow attendees and organizers to plan ahead, and participants operate in “silos” without sufficient cross-community discussion. Interviewees also expressed concerns that ICANN does not allow for “casual involvement”: those who may be interested in one aspect of ICANN but are unable to commit substantial amounts of time to the process may be too overwhelmed by the complexity of ICANN’s policy decisions and public participation processes to get involved. In reflecting on his term as ICANN’s General Manager of Public Participation, Kieren McCarthy noted on his blog that he wished he had recommended that ICANN develop “a range of simpler input mechanisms—such as polls—that are not reliant on people reading whole reports and responding to specific wording” in order to encourage increased public participation.⁵⁴

(c) Discussion

Additional improvements in public participation processes must focus on lowering the barriers for constructive contributions to ICANN. Concerns regarding timing of comment forums, the number of substantive issues that are posted simultaneously, and how widely these forums are publicized among diverse community members may be addressed by establishing standards for timing, structure, and outreach. These need not be exhaustive. Rather, they would present some sense of a consistent baseline (overarching timeframe for the process; channels of distribution; protocols for comment summarization; availability of translations) and some menu of options (e.g., possible tools, perhaps tailored to the type and urgency of the decision). The conditions or different categories of policy decisions that might warrant public input might also be differentiated.⁵⁵

While ICANN staff noted that they are investigating innovative new tools for public participation, including various social media and survey documents, to date they have not been widely tested. Multiple interviewees commented on the potential of threaded strains of dialogue, which would

allow conversations in the comment forums to be easily tracked and observed by participants. One possible new mechanism might be allowing community members to add threaded comments directly to specific sections of a document or proposal. Multi-round comments periods, where commentators are explicitly asked to comment on prior comments, would also encourage members of the public to engage with each others' arguments and positions.

(d) Recommendations

- Establish and observe baseline standards for the structure and timing of public comment periods. Differentiate between the public input requirements for different types of ICANN activities and decisions (e.g., requests for information, policy-making proposals, draft documents) and create standards accordingly.
- Ensure that there is adequate coordination by ICANN staff and constituent bodies of the different comment periods to better address the volume and timing of public comment periods.
- Solicit public input and structure comment periods with tools that better foster dialogue among stakeholders and with the ICANN staff; explore, evaluate and implement such mechanisms in order to develop conversations between individuals, their constituencies, the staff, and ultimately the Board.
- Continue to improve opportunities to participate in ICANN meetings by announcing the specific locations of these meeting further in advance.
- Continue to improve the quality and timely publication of translations of relevant materials and comments. Explore methods of engaging stakeholders and volunteers in translation.

2.2 Aggregating and Responding to Public Input

(a) Issues

ICANN staff members are tasked with interpreting, processing and organizing comments, but there appears to be no consistent practice, methodology, or timetable for this process. Standards that do exist are not evident to external participants. Feedback on public participation is weak; it is difficult, if not impossible, for contributors to know how and when comments have been aggregated, summarized and incorporated into decisions.

(b) Observations

The summarization and analysis of community inputs vary across different decisions and forums. Multiple challenges exist regarding the "right process" for accurately analyzing public comments. First, it is difficult to gauge public sentiment based on public comments. This is complicated by letter-writing campaigns or particularly zealous contributors. Individual comments may be more useful or implementable than common viewpoints. Second, the volume, length and quality of public comments vary wildly. Furthermore, some comments are submitted to the incorrect forum; comments that would better suit topic-specific forums (for example,

string contention procedures in the new gTLD program) are submitted to general forums (for example, the comment forum for the entire Draft Applicant Guidebook).

While acknowledging the difficulty of accurately analyzing the range of public inputs, interviewees and submissions to the ATRT expressed concerns that many current summaries omit certain comments, and that comments are unfairly weighted (for example, a form letter signed by several trademark organizations may count as multiple individual comments, while a form letter signed by multiple individuals may only count as a single comment). Some interviewees believe analyses of public comments were oversimplified.

Despite these difficulties, several of those interviewed pointed to the marked improvements in incorporating public input and communicating ICANN’s response back to the community in the more recent rounds of revisions to the new gTLD Draft Applicant Guidebook (DAG).

(c) Discussion

Although there can be no exact science for the summarization of public comments, developing and communicating baseline standards for the process can help strengthen the legitimacy of the final analysis. Guidelines, more defined templates, and explicit channels for public input can help community members to be clear on the flow of their contributions.

ICANN’s practice of providing a summary/analysis along with a full archive of public comments is an important means of showing that comments have been received and considered. However, opportunities to track one’s comments along the lifecycle of a decision-making process could be improved. Engaging the “crowd”—with well defined rules for participation in order to prevent abuse—to help to categorize, filter, interpret and aggregate comments, point to redundancies, and guide participants to resources or answers may ease the burden on ICANN staff and enhance the perception that public inputs are being considered.⁵⁶

The use of new processes to bring public input to bear on key policy decisions is an opportunity to advance the efficacy of public participation. For example, in the context of the new gTLD program, a new public comment analysis model was trialed in which summary/analysis documents are structured by categories related to the different proposals, in order to develop amendments to the DAG. Sections of the DAG that have been changed in response to comments are noted in the footnotes. Similar options could be tailored according the particular objectives of the policy development process in question.

(d) Recommendations

- Develop and communicate baseline procedures and guidelines for summarizing and analyzing public comments. Continue to provide support and training for staff in their use.
- Continue to experiment with different public input response mechanisms; explore, evaluate, and establish mechanisms to improve the ability of stakeholders to track the life-cycle of their input into ICANN policy-making and decision-making processes. Such efforts should be undertaken with clear goals in mind, towards enhancing the efficiency of existing processes, or addressing key gaps or improvements, under well-defined and well-communicated conditions.

- Explore opportunities and tools to engage community members in the summarization and analysis of comments.

2.3 Incorporating Public Input into ICANN decisions

(a) Issues

Despite the multiple opportunities for public input regarding policy decisions, community members have expressed concerns that it is difficult for them to know how and when their comments have been incorporated and reflected in Board decisions. Additional issues related to the transparency of Board decision making are outlined in Section IV C.2.3.

(b) Observations

The ATRT received a large number of comments concerning the decision making of the Board; most expressed the opinion that the “Board’s decisions should be better justified and explained to the community.”⁵⁷ Interviewees expressed concerns that Board decisions that seemed to contradict public comments were not sufficiently explained. One example mentioned was the Expression of Interest proposal, which many commentators supported either fully or conditionally but was ultimately rejected by the Board. According to comments to the ATRT, another occasion where the explanation of Board decisions was judged insufficient is redelegation decisions.

According to interviews, staff ideas currently under discussion for improving the Board’s communication of its decisions to the public include creating an explanation template for the Board to complete and publish after each decision and developing a matrix to explain how comments have been considered and where and how these have influenced decisions.

(c) Discussion

A lack of clarity regarding how public input is reflected in Board decision making, particularly in cases when Board decisions may appear to deviate from the opinions expressed by the majority of those who have submitted public input, can be detrimental to ICANN’s legitimacy. Community members who believe their input is being undervalued or disregarded may be less likely to contribute in the future. They may also be less likely to trust the ICANN Board to make decisions in the public interest or elect to take their complaints to other, external forums, such as the courts or national governments. Empirical studies in fields that involve adversarial processes and dispute resolution have shown that when community members are able to recognize that their interests have been thoughtfully considered, they are generally more satisfied, regardless of the ultimate outcome.⁵⁸

(d) Recommendations

- Provide more explicit and detailed information regarding the rationale for decisions by the Board, including the reasons why community input may have been rejected or incorporated in the final outcome.

2.4 Need for Enhanced Cross-Community Dialogue

(a) Issues

ICANN has committed itself to “assessing the policy development process to facilitate enhanced cross community deliberations.”⁵⁹ Anecdotal evidence suggests that improvements in the existing channels and mechanisms for cross community deliberations, both formal and informal, are still needed at early stages of decision-making processes.

(b) Observations

The need for better cross-community dialogue at early stages of decision making arose multiple times in the interviews. Interviewees suggested that policy development delays often stem from cases where different groups within the ICANN community speak up on issues too late, after these issues have been nearly finalized. In the view of these interviewees, early interaction between these groups leads to more efficient policy development and is more conducive to consensus and broader inclusion.

Some interviewees expressed concerns that groups within the ICANN community currently operate separately from one another: a single group publishes a document, other groups comment on it, and then the staff and Board decide what steps to take next. These interviewees advocated for more community-wide discussion before documents are published, in order to prevent this later “ping-pong” effect.

In some instances, ICANN has implemented cross-community working groups to address specific issues. One example is the working group on recommendation 6 of the new gTLD program (which addresses “morality and public order”).⁶⁰ This group contains representatives from the ALAC, the GNSO, and the GAC. Interviewees pointed to this group as a positive example of dialogue between various groups within the ICANN community; however, they also expressed the opinion that this group came too late in the process, i.e., that it was established to solve a problem caused by a lack of sufficient cross-community dialogue earlier in the development of the new gTLD program.

(c) Discussion

A lack of sufficient cross-community deliberation at early stages of policy discussions may cause delays by preventing various stakeholders within the ICANN community from contributing to the identification of major issues related to a specific policy. For example, more cross-community dialogue before the publication of the first version of the Draft Applicant Guidebook for the new gTLD program may have helped identify the “overarching issues” and other controversial issues that subsequently arose.

The establishment of working groups containing representatives from multiple Advisory Committees (ACs) and Supporting Organizations (SOs) before the finalization of policy recommendations may help identify and resolve “hot button” issues. Increasing opportunities for

cross-community interaction at ICANN meetings may help provide clear channels for discussion among various ICANN constituent bodies.

We recognize that enhancing cross-community dialogue will not preclude dissatisfied participants from looking for additional venues to express their dissent, e.g., by lobbying Board members to address their concerns or reopen aspects of the policy-making policy. Nor do we believe that such actions are inappropriate in all instances.

Seeking additional opportunities for cross-community dialogue, both formally and informally, is intended to be judiciously applied as a complement to the various other established mechanisms for building consensus and collective deliberation.

(d) Recommendation

- Encourage ICANN’s various constituent bodies to engage in cross-community interactions in early stages of policy initiatives, discussions, and deliberations. Explore explicit policies and procedures for triggering cross-community deliberation among ICANN’s various constituent bodies.

C. Board Governance—Corporate Governance and Board Activities

1. General Considerations

ICANN faces a number of challenges at the nexus of transparency, accountability, and governance. These challenges reflect its unique position straddling the public-private divide, the many constituencies and stakeholder groups involved, the global nature of its charge, the desire to retain the consensual basis of its governance, and the tensions and mission conflicts inherent within ICANN itself. Corporate governance policies are central to transparency and accountability at ICANN. Any reforms designed to improve transparency and accountability must also take into account the need to make sound decisions in an efficient and timely manner.

At the heart of its corporate governance challenge is the fact that ICANN represents an overlay of multiple institutional models. ICANN was established to act as a bottom-up consensus-based organization representative of global interests. ICANN is also a California nonprofit corporation. These two models are currently reconciled with the understanding that the Board is ultimately responsible for the actions of the organization—stemming from California law—and must therefore, in keeping with its global responsibilities, properly oversee and implement the bottom-up consensual model. This implies that the Board must be in the position to fully understand, interpret, and act in accordance with the interests and preferences of the ICANN community and broader set of stakeholders. This applies not only when there is consensus but also when consensus is not reached. When operating within the current accountability model constructed on transparency, participation and procedure, ensuring that the Board has the capacity and resources to properly evaluate and interpret the needs and input of the community is critical.

Given ICANN's unique set of responsibilities and diverse functional roles, the lessons and best practices from the field of corporate governance cannot be directly applied to ICANN without taking into account its specific institutional context.

The various notions of accountability, as described in Section II B.1 , relate both to ICANN's legal foundations under California law and also its broader responsibility to Internet users around the globe. The Board plays a central role in both. This extends to the composition of the Board, the relationship of the Board with the staff and the interaction with constituent bodies, for example the GAC. It also extends to alternatives models for independent review of ICANN decisions.

Corporate governance includes not only structure, rules and procedures but also the cultural values and norms of the organization and the manner in which they are expressed in day-to-day activities and interactions with stakeholders. Both aspects play a complementary and essential role in the transparency, accountability and effectiveness of the organization.

ICANN should continue to be a leader in applying transparency and public participation to improve governance. The Internet and other digital means of interaction and information sharing are creating new opportunities to improve on older models, but much of this terrain is uncharted. ICANN can and should be experimenting with different conceptions of transparency and accountability and assessing the results regularly. Using these experiments to improve ICANN's overall practice will involve careful design, ongoing monitoring, and a willingness to accept that some of the experimental measures tried will be unsuccessful.

2. Issue-Specific Observations and Recommendations

2.1 Board composition

(a) Issues

In interviews and in various public submissions, concerns have been expressed regarding the composition of the ICANN Board. There are two key aspects related to ICANN's Board composition: the expertise and skill sets represented on the Board and adequate representation of the various stakeholders, including representation of different geographic regions and commercial and non-commercial interests.

(b) Observations

Concerns were expressed in interviews whether the proper range of skills were adequately represented on the Board. Submissions to the ATRT expressed the desire for "broader business expertise and gender diversity" in the Board. Public submissions to the ATRT indicate that some community members feel that at least certain aspects of the Board selection process, for instance with regard to selection criteria used, are not transparent enough; interviewees expressed concerns that the activities and decisions of the Nominating Committee are not as effective as they could be.

ICANN’s Bylaws contain rather detailed rules about the selection of the total 15 Board members by the Nominating Committee, the Address Supporting Organization, the Country-Code Names Supporting Organization, and the Generic Names Supporting Organization.⁶¹ For each category of seats, the Bylaws stipulate a diverse set of Board membership criteria. Importantly, the Nominating Committee “shall seek to ensure that the ICANN Board is composed of members who in the aggregate display diversity in geography, culture, skills, experience, and perspective” by applying a rich set of selection criteria, which include “inward-looking” (e.g., integrity, intelligence) and more “outward facing” selection criteria (e.g., cultural and geographic diversity).⁶²

Board selection processes and composition issues, respectively, have been subject to extensive internal and external reviews. Both the Nominating Committee and the Board have undergone an independent review by external experts, which resulted in a series of overlapping recommendations. According to interviews, several of the recommendations—especially with regard to definition of skills, experience, and independence—are currently being implemented.

(c) Discussion

Since the implementation of the recommendations of previous independent reviews is still ongoing, it is too early to provide a final assessment of the measures underway that are intended to resolve the issues identified in this section or to determine whether additional remedies have to be considered. In addition to other skill sets being considered for the Board, we believe that there should be more emphasis in Board selection on corporate governance, collective decision-making, negotiation, and dispute resolution skills to help the Board deal more effectively with conflicting values and interests in the ICANN community. We concur with prior recommendations that suggest compensating Board members and recruiting professional directors to fill specific skill needs. Overall, the efforts underway demonstrate ICANN’s commitment to assess and improve ICANN’s Board selection mechanism as required by paragraph 9.1(a) of the AoC.

The review of materials suggests a current focus on Board selection issues in order to ensure that the ICANN Board is composed of members that have the appropriate skills and represent the various stakeholders. However, looking at the demanding and in some instances potentially conflicting goals of ICANN, one might consider shifting the emphasis over time from Board *selection* to Board *development* processes, especially in light of changing needs regarding skill sets as ICANN’s economic and technological context evolves. For similar purposes, major nonprofit organizations (e.g., the United States Girl Scouts and the American Red Cross) have established Board development committees. According to interviewees, ICANN has already taken first steps into this direction (e.g., with special training sessions on particular issues for Board members based on survey-based self evaluation).

(d) Recommendations

- Implement the recommendations of prior studies to focus more attention on Board composition and skills, including the recommendation regarding the establishment of a mechanism for identifying the collective skill-set required by the ICANN Board and for

consulting with stakeholders on this issue. Periodically evaluate progress on these issues.

- Provide more emphasis in Board selection on corporate governance, collective decision-making, negotiation, and dispute resolution skills.
- Consider recruiting professional directors to fill specific skill needs.
- Increase the transparency of the work of the Nominating Committee as far as selection criteria and selection mechanisms are concerned; the deliberations over individual candidates, however, should remain confidential.
- Building upon current efforts, consider the expansion of Board selection processes to include Board *development* activities by establishing a Board development committee.

2.2 Board-Staff relationship

(a) Issues

Concerns have been expressed in some interviews and in a number of public submissions that the relationship between ICANN staff members and the Board is not structured in a way that is conducive to ensuring that the Board effectively incorporates and responds to the full range of community inputs. There is a widespread perception that the staff plays an overly dominant role in setting the agenda and shaping the informational basis of Board decisions.

The broad scope and complexity of ICANN activities results in a demanding workload for ICANN Board members, which in turn raises questions regarding their ability to devote sufficient time to proactively oversee the activities of the staff and guide the strategic direction of the organization.

(b) Observations

The perception that was voiced repeatedly in the interviews was that the staff are taking too many unilateral decisions and are inappropriately filtering community input, weakening the bottom-up consultative and policy-making processes. One recent example put forth was the inclusion in the DAG of connections to terrorist organizations as a new criterion for denying applications for new gTLDs; this provision was reported to be not the product of the bottom-up policy-making process but inserted by the staff. Interviewees and public submissions to the ATRT indicated a community perception that the ICANN staff dismisses issues of concern to the community with which the staff does not agree; interviewees expressed ongoing frustration with this perceived situation.

In contrast, some interviewees consider the gTLD case an example of recent improvements in the flow of information from the community to staff to Board, particularly with respect to how public comments on the gTLD process are summarized and passed to the ICANN Board by staff (e.g., comments are attributed to specific people and links to original sources are provided).

Continued evolution of the Board Committee model may also provide channels to identify and engage with organizational priorities, encourage Board interaction with analogous efforts occurring at both the community and staff level, and help make the Board's work more efficient. A proactive approach is evident in the establishment of New Board Committees in 2008, and the dissolution of certain existing Board committees in order to serve "the best interests of ICANN."⁶³ New Board committees include the IANA Committee, the Public Participation Committee, the Risk Committee, and the Structural Improvements Committee.⁶⁴

Prior reports and interview responses have highlighted the issues associated with a demanding work load for the Board along with the challenges of setting priorities among many disparate activities.⁶⁵

(c) Discussion

The issue addressed in this section focuses on the distribution of agenda-setting and decision-making responsibility between ICANN staff and Board and the question of how the interactions between staff and Board may be structured in order to ensure that community inputs are best understood and taken into account in decision-making processes.

The question of the appropriate relationship—and effective interaction—between staff and Board is a question that challenges many organizations. In most corporations of any size, the staff has an important, and often predominant, role both in the day-to-day management of the organization and in setting its larger agenda. In the for-profit sphere, this increased power of the executive staff has become accepted, to the extent that the *American Law Institute Principles of Corporate Governance*, applicable to public companies, states: "The management of the business of a publicly held corporation should be conducted by or under the supervision of such principal senior executives as are designated by the Board of directors."⁶⁶

The trend in nonprofits is broadly similar. As one text on nonprofit organizations states:

*Management of nonprofit organizations normally is vested in its senior employees. A basic function of the Board is to select these executives and to oversee their performance. . . . It has been suggested that a Board's most important judgment is the content of its agenda, that is, the decision as to what it will tend to and how it will allocate the limited resources and time available. . . . Usually management rather than the Board sets the agenda for Board consideration. Thus, the Board is more often reactive than initiatory. The larger the nonprofit organization, the more complex and diverse will be its activities and the less likely a Board will become involved in a particular decision.*⁶⁷

There are competing theories related to the strength and level of engagement of Boards. Operational aspects of organizations are normally delegated to staff along with ample latitude to make operational decisions backed up by strategic guidance from the Board. For ICANN, the extensive operational aspects of the organization appears suited to such a model. However, the decisions made by ICANN, for which the Board is ultimately responsible, particularly related to the competing use of scarce resources and competing interests within the community, suggests the need for stronger Board involvement compared to other organizations.

Increasing the capacity of the Board to effectively incorporate and respond to the full range of inputs generated in the bottom-up processes of ICANN will likely require increasing both the amount and the effectiveness of time spent by Board members on ICANN's affairs while relying less on the staff to gauge the sentiments of the community and to properly interpret their input and advice. This implies not an expanded role for the Board but deeper involvement in its current activities. A well-informed Board is entirely consistent with the bottom-up nature of the organization; the Board must be in a position to speak accurately and effectively to all the perspectives of the ICANN community. Making even better use of Board committees can help increase the effectiveness of the Board. One countervailing concern is the need to be sure that committees are adequately representative across stakeholder groups.

Increased transparency related to the staff-Board relationship is likely to both support the appropriate division of labor and respective levels of responsibility and control between staff and Board, and address the perception issues expressed by parts of the ICANN community.

(d) Recommendations

- Continue to strengthen the capacity of the Board to proactively and visibly steer ICANN activities.
- Address concerns regarding the amount and effectiveness of time spent by Board members on relevant fact-finding, deliberation, decision-making and oversight activities.
- Increase the level of transparency in staff-Board interactions to further increase performance and address perception issues regarding potential staff capture.

2.3 Transparency of decision making

(a) Issues

Some stakeholders have expressed concerns that Board decisions are made without properly taking into account their input and therefore without considering the full set of relevant facts. Multiple opportunities for input and participation have not resolved the perceptions that stakeholders are not being fairly represented.

(b) Observations

Despite recent steps taken to increase transparency about Board processes, many interviewees reported that the Board decision-making process is opaque and the rationale for decisions not fully articulated. While the minutes of Board meeting are published on the ICANN website, some interview respondents report that the minutes neither capture the full basis for decisions nor provide sufficient detail. Submissions to the ATRT expressed concerns that Board decisions are not transparent: "decisions are made without anyone being aware of the logic used to arrive at them and explanations of decisions, if any, are inadequate."⁶⁸

The Board recently decided to publish the non-confidential sections of Board briefing materials prepared by the staff.⁶⁹ Critics have expressed skepticism about the transparency effect, however, since a significant amount of information has been redacted.⁷⁰

A recently launched ICANN project is focused on creating a wiki that will provide “the public with easy-to-access information on every substantive resolution approved by the Board of Directors” along with basic information regarding the status of these resolutions.⁷¹ According to interviewees, this process will soon be completed; one interviewee stated that the database of resolutions is likely to be linked over time to implementation measures taken at the staff level. The wiki currently presents Board resolutions from 2009. It is not editable or interactive at this stage (the wiki references an “Add Comment” box that appears to be missing), though one would expect these features in a wiki.

(c) Discussion

ICANN relies more on transparency for accountability and legitimacy than other organizations and therefore should arguably offer greater transparency in its decision-making processes. However, the issues around transparency in decision making are complex and involve conflicting goals and needs. In some instances, such as policy making by the Federal Reserve and decision making by juries and judicial panels, there is a tradition for keeping deliberations intentionally private. In other instances, such as legislation, so-called “sunshine laws” adopted by many states are intended to give openness to many policy-making processes. The lessons of corporate governance do not clearly establish positive impact of greater transparency in the deliberative stages of decision making. Transparency in decision-making processes should be considered carefully, so as to preserve the ability of the Board to discuss matters candidly and to make consensus decisions where appropriate. In contexts such as personnel decisions or the candid policy-setting deliberations, there may be benefits to some measure of opacity.

In the information-gathering phase of a decision, transparency on materials submitted, generated, and consulted is desirable. Making such materials public can help to provoke the provision of further materials that might otherwise be overlooked. Fact-gathering hearings in legislative and other policy contexts are typically open to the public.

There are contending arguments about the benefits of transparency in the deliberations themselves, and the comparative practices in organizations such as the World Bank and the Asia Development Bank show deliberate and broad exceptions for decision-making and deliberative processes from more generally applicable transparency standards and commitments. In a context where representatives for contending constituencies are trying to forge an outcome for the common good, for instance, transparency can lead to constituency pressure to harden positions and thus make positive outcomes less likely to occur. On the other hand, constituencies may be suspicious that they have been “sold out” in a compromise that occurs in an opaque fashion. This suspicion can be lessened by the clear enunciation of reasons for a decision post facto and by sufficient transparency and engagement by the Board in the up-front process, so that there is an assurance that the losing arguments and information were in fact heard and meaningfully considered.

Unlike many other organizations, ICANN does not have the luxury of relying predominantly on outcome-based measures of efficacy to maintain the confidence of its participants and stakeholders. Process and perception are important. While noting that it is impossible for ICANN to satisfy all of its stakeholders and critics, the perception of any impropriety, whether justified or not, reduces the legitimacy of this consensus-based organization. While greater transparency will not resolve all of these questions, it is an important step and a worthwhile effort.

Improving the transparency of decisions extends beyond Board decisions. ICANN should continue to codify and clarify internal working procedures as they contribute to better corporate governance. Models from EU and US administrative laws—for instance, regarding consultation or rulemaking processes—and their equivalents in many countries may serve as starting points, although less complex procedures will probably suit the needs of ICANN. Periodic evaluations of internal compliance with established procedures by a dedicated staff member are an essential step.

ICANN is part of an exploration of new ways in which the Internet and other digitized avenues can improve on traditional governance forms. ICANN should engage with the larger community exploring e-rulemaking and e-governance at various levels and conduct explicit experiments within ICANN's procedures.

(d) Recommendations

- Better delineate areas of high, medium, and limited disclosure of Board inputs, deliberations, and decisions, and the rationale for each.
- Provide detailed explanations of the reasons for taking various decisions, including the manner in which expert opinion and community input are factored into these decisions. Respectfully recapitulating the losing arguments may be useful.

2.4 Independent Review

General Considerations

ICANN provides three avenues for review of Board and staff decisions: the Ombudsman, Reconsideration Requests, and the Independent Review Panel (IRP).⁷² To varying degrees, each mechanism is aimed at increasing ICANN's accountability. According to the Bylaws, Reconsideration Requests and the IRP "are intended to reinforce the various accountability mechanisms otherwise set forth."⁷³ The Ombudsman "shall serve as an advocate for fairness" in cases in which the Reconsideration Request and IRP procedures have not been invoked.⁷⁴ These mechanisms do not follow a specific hierarchy or sequence of activation; in practice, however, they interact with each other and may be interpreted as an "escalation model."

The IRP process in particular was explicitly introduced to increase ICANN's accountability. In scholarship and interviews, different views have been expressed as to what the underlying rationale of the IRP process is and what kind of accountability it provides to whom. The disagreement about the particular role that the IRP does or should play within different theories of accountability⁷⁵ has translated into practical issues that surfaced in the materials reviews,

including the question of who should or should not have standing under the IRP rules, what the appropriate panel structure is, and whether the decision by the panel could or should be binding or not.

Alternative proposals for independent review processes have been put forth. One proposal would institute a community re-vote mechanism. Another proposal would create a binding arbitration regime with an independent standing panel that would serve as a mechanism to overturn Board decisions, including a provision that would offer third parties, such as registrants, standing.⁷⁶ It is outside the scope of this report to explore in detail the merits and demerits of these respective proposals. Based on the detailed exploration of the .xxx case review process as requested in the Services Agreement, the Berkman team has focused on the review of the existing IRP process, with an eye towards the Ombudsman and the Reconsideration Request procedures as avenues for early-stage dispute prevention and resolution.

(a) Issues

The IRP process in the .xxx case—the first and, to date, only case in which the IRP has been employed—has raised concerns about the cost and accessibility of the process and its utility as an accountability mechanism.

(b) Observations

Several interviewees indicated that the IRP process can be considered a success, in that it prompted a reconsideration of the case, compelled ICANN to publicly defend the basis for its decision, and convinced the Board to begin a new round of contract negotiations for a .xxx registry agreement with ICM. Nonetheless, other observers have indicated that the .xxx case revealed a number of difficulties and limitations in the IRP, including its costliness, a lack of clear procedures, and the probable difficulty of employing the IRP by noncommercial interests. Interviewees have suggested that the cost, inaccessibility, and nonbinding nature of the rulings of the IRP significantly reduce the likelihood that disputants—even commercial disputants with adequate resources—will turn to the IRP as a means of resolving their disputes. Rather, interviewees have suggested that it would be preferable to proceed directly to litigation in California courts. It has been argued that this state of affairs further reduces the usefulness of the IRP as an accountability mechanism, places further burdens (in terms of time, resources, public image, and so forth) on all parties involved, and reduces the accessibility of appropriate dispute resolution processes to non-US stakeholders.

In light of the IRP's finding in *ICM v. ICANN* that the IRP's recommendations are non-binding on the ICANN Board, questions have been raised over the possibility of instituting a binding external review process. Independent experts have expressed strong doubts whether a binding version of the current review mechanism (which allows for review of any Board actions) would hold up under Californian corporate law, although alternative designs may well do so. This interpretation is supported by a recent ICANN memorandum on third-party review of Board actions.⁷⁷ The memorandum explains that the California Corporate Code permits the Board of Directors to delegate certain management functions to employees, committees, and other third parties, so long as the corporate powers are exercised under the ultimate direction of the Board. However, according to the memorandum, the Board is prohibited from empowering any other

entity with ability to overturn the Board’s actions or decisions, although the memorandum does recognize the validity of entering into binding arbitration that is more narrowly defined and based on contractual agreements.

(c) Discussion

Some of the dissatisfaction expressed in interviews and in reviewed materials regarding the .xxx case appears to be the inevitable byproduct of a difficult, contested issue. Matters related to sex and free speech are challenging to policy makers in almost any context and invoke strong, and not always coherent, political considerations in many countries and traditions. These substantive concerns are outside the scope of this review. However, the anecdotal evidence collected in the context of the .xxx case study confirms the concern expressed in parts of the community that the costs of the IRP process may be prohibitively high for certain stakeholders. Despite the fact that such an observation is currently based on only one application of the IRP process, it is advisable to clarify its scope and, if necessary, to consider a less burdensome and costly alternative.

Considering the design of the existing IRP process in general and the current (broad) scope of IRP review as set forth in the Bylaws in particular, the Berkman team concludes that it is not advisable to implement such a broad-reaching binding third-party review of any Board decisions and actions. First, and legal constraints notwithstanding, it is questionable from a normative policy and governance perspective whether a binding general third-party review mechanism applicable to all Board decisions and actions would improve the status quo. Second, it remains doubtful whether such a broad regime would hold under Californian corporate law. More promising, from both legal and normative perspectives, are proposals for binding arbitration-based review mechanisms that are narrower in terms of their scope of review; the detailed evaluation of such proposals, however, is outside the scope of this report. That being said, the non-binding review mechanisms within the current structure can be made more effective by having the Board make a cultural and procedural commitment to hearing it out and dealing with it seriously.

The legal and practical limitations on the IRP process highlight the importance of *ex ante* decision-making processes. Creating more robust and better-defined processes up front for policy and other decision making, along the lines discussed at Section IV C.2.3(c) above, will reduce the need for back-end review. Dispute avoidance is generally better than *ex post* dispute resolution. Where disputes emerge, it is advisable to address them at the earliest possible stage and to encourage alternative dispute resolution mechanisms—for instance, conciliation, negotiation, and mediation—to minimize the escalation of disputes to the point where an IRP hearing would be needed. In this context, it is advisable to improve the public’s perception of the various dispute resolution mechanisms, to strengthen the Ombudsman’s role, and expand the grounds on which a disputant can initiate a Reconsideration Request.

(d) Recommendation

- Better define the scope of the IRP processes, with an eye not only to better access and fairness, but also to cost containment and early identification of issues that should be fully argued and briefed and those that can be resolved at a more summary level.

2.5 Board and role of the GAC

General Considerations

The GAC plays an important but often unclear, uncertain, and occasionally contentious role in ICANN decision-making processes. This section focuses on the ways in which the Board interacts with the GAC and considers its inputs.

On several occasions, the Board and the GAC have expressed different views on what constitutes GAC advice and how GAC inputs to the Board should be handled. In particular, many believe that in certain instances, the ICANN Board has neither properly heeded the advice of the GAC nor offered the GAC the appropriate level of deference. The ambiguities surrounding the Board-GAC relationship raise issues related to transparency, and involve complex questions related to disparate organizational cultures, the challenges of aligning internal processes across multiple institutions, and complex cross-community communication mechanisms.

In June 2009, the Board established a joint Board-GAC working group to review the role of the GAC in ICANN, consider how to better support the GAC's work, and develop proposals for how to improve communication among the Board, the GAC, individual governments, and the ICANN community. With this in mind, the following section focuses on two specific issues: the question of what constitutes GAC advice and how the Board can improve its interaction with the GAC within the current framework, processes, and respective roles and responsibilities.

2.5.1 Definition of "GAC advice"

(a) Issues

It is unclear what types of GAC inputs constitute advice or opinions and what are the appropriate channels of communication for submitting GAC input to the Board. The GAC and the Board do not have mutual definitions for these terms and do not agree on acceptable methods of communicating these inputs.

(b) Observations

According to the ICANN Bylaws, the role of the GAC is to "consider and provide advice on the activities of ICANN" which relate to the concerns of governments, "particularly where there may be an interaction between ICANN's policies and various laws and international agreements or where they may affect public policy issues."⁷⁸ Furthermore, the GAC can submit advice "by putt[ing] issues to the Board directly, either by way of comment or prior advice" or by "specifically recommending action or new policy development or revision to existing policies."⁷⁹ However, the Bylaws inconsistently state that the Board is required to "request the *opinion*" of the GAC on any policy that "substantially affect[s] the operation of the Internet or third parties" or "public policy concerns."⁸⁰

The ICANN Bylaws do not specify how GAC advice or opinions should be communicated to the ICANN Board.⁸¹ Specifically, they do not designate an individual from the GAC who is responsible for communicating advice or opinion or a designated individual from the ICANN Board who is responsible for receiving the GAC advice or opinion. Additionally, the Bylaws do not circumscribe the permissible mediums of communication, that is, that communication of GAC input would *only* be acceptable through letters from the GAC Chair and adopted Communiqués.

According to interviews conducted by the Berkman team and public submissions to the ATRT, GAC members generally believe that advice or opinions can be submitted through a variety of means, including e-mail, letters, in-person briefings at public and private joint meetings, and Communiqués. For example, in the context of the gTLD case, the GAC stated its position on the use of geographic names as top-level domains in seven separate Communiqués and two letters to the Board between October 2007 and March 2010. Yet, other interviewees stated that some Board members believe that the GAC’s view of how advice and opinion can be communicated is overly expansive and that advice should only come from the GAC Chair in written form. Interviewees also noted that the Board is occasionally briefed by the GAC Liaison to the Board during meetings; however, it was unclear if such briefings were intended to serve as an official communication of advice or opinion.⁸²

Throughout 2004–2007, while the .xxx sTLD application was pending before the Board, several members of the GAC, including the GAC Chair, sent direct correspondence to the Board regarding the case.⁸³ Some letters expressed concerns related to the application and others intimated that the Board’s actions were inconsistent with prior GAC advice, Bylaws procedures, or had not yet been adequately addressed by the GAC, and requested explanation of actions.⁸⁴ Throughout this time period, the GAC issued multiple Communiqués that provided various forms of feedback to the Board on the .xxx application.⁸⁵ Interviewees noted that the conflicting nature of the letters by the GAC is problematic, as the capacity of the writer was not clearly defined (i.e., whether it was written on behalf of the GAC or as an individual member of the GAC). Interviewees were uncertain how the Board viewed these interactions, and whether the Bylaws required an official Board response. In several cases, the GAC members were dissatisfied with responses received.

(c) Discussion

It is clear there are discrepancies between how the Board and the GAC interpret the ICANN Bylaws. In particular, both the definition of GAC advice and the appropriate method of communicating of that advice to the Board are contested. In addition to lacking a precise definition of the term “advice,” the Bylaws use “opinion” and “comment” in a manner that implies the terms are interchangeable. It is unclear whether these terms were intended to be identical and apply to an equal scope of subject matter.

The Bylaws do not describe the methods by which the GAC is permitted to submit its advice or opinion to the Board. It is also unclear which methods of communication trigger the Board’s obligations in the Bylaws to take the GAC’s advice into account, to provide notice and explanation to the GAC when the Board declines to follow GAC advice or opinion, and to work with the GAC to come to a mutually satisfactory compromise.⁸⁶

Events documented in ICANN correspondence and GAC Communiqués during the .xxx application process indicate that the lack of discernable boundaries for channels of communication caused confusion when multiple GAC members submitted correspondence to the Board concurrently, often expressing conflicting views with prior advice or opinion. Some GAC members felt they had not been given adequate opportunity to discuss viewpoints with the Board and others felt their advice was not followed without explanation.

(d) Recommendation

- In close consultation with the GAC, clarify what constitutes GAC “advice” or “opinion” and clarify the most effective channels of communication for submitting GAC advice to the Board.

2.5.2 Board-GAC Interaction

(a) Issues

Communication between the Board and the GAC is not always strong, timely, or efficient.

(b) Observations

The ICANN Bylaws require the Board to “notify the Chair of the [GAC] in a timely manner of any proposal raising public policy issues on which it or any of ICANN’s supporting organizations or advisory committees seeks public comment.”⁸⁷ The Board is also required “to request the opinion of the GAC” on “any policies that are being considered by the Board for adoption that substantially affect the operation of the internet or third parties” or “public policy concerns.”⁸⁸

In cases where the GAC issues advice⁸⁹ to the Board, regardless of whether such advice is requested, the advice must be “duly taken into account, both in the formulation and adoption of policies” by the Board.⁹⁰ If the Board “determines to take an action that is inconsistent with the [GAC’s] advice” the Board must “state the reasons why it decided not to follow that advice” and try to find a “mutually acceptable solution.”⁹¹ If no solution is found, the Board is required to state the reasons why the GAC advice was not followed in its final decision.⁹²

The GAC appoints a “non-voting liaison to the ICANN Board” annually.⁹³ The GAC Liaison is entitled to attend Board meetings, participate in Board discussions and deliberations, and have access to certain related Board briefing materials.⁹⁴ Liaisons to the Board are also permitted to “use any materials provided to them . . . for the purpose of consulting with their respective committee or organization.”⁹⁵ Some interviewees noted that the GAC Liaison occasionally briefs the Board on issues of concern to GAC members and that there is a general expectation that the GAC Liaison briefs GAC members on pending issues before the Board, except in instances where confidentiality is required. The GAC has consistently appointed the GAC Chair as GAC Liaison to the Board.⁹⁶

Interviewees made clear that the majority of Board members believe presence of the GAC Liaison during Board meetings is sufficient to put the GAC on “notice” of proposals that raise public policy issues as is required in the Bylaws.⁹⁷ However, other interviewees noted that GAC

members have interpreted this Bylaw provision to require more specific notice in more formal correspondence to the GAC Chair, such as a written letter. Some GAC members have also expressed concerns that notice from the Board of proposed policy decisions is not always timely. In such cases, receiving a late notice adversely affected the GAC's ability to effectively provide advice on pending issues in a timely manner. Additionally, GAC members have expressed concerns that the Board does not provide feedback on GAC advice that has already been submitted to the Board, including whether additional GAC advice would be helpful.

These observations are independently supported by ICANN documents. For instance, following the June 1, 2005 Board resolution to begin negotiating the terms of a registry agreement for the .xxx proposal, several GAC members expressed concerns that the .xxx proposal had "significant impacts in local concerns" and that the GAC had inadequate time to consider merits of the proposal.⁹⁸ Separately, throughout 2007–2010 the GAC issued seven Communiqués repeating its advice regarding the use of geographic top-level domains.

Although the Bylaws specify that the Board "shall notify the Chair of the Governmental Advisory Committee . . . of any proposals raising public policy issues,"⁹⁹ the Bylaws do not specify the level of detail required in the notification GAC Chair (i.e., whether the notification merely requires a general notice that the Board is considering a proposal, or whether the notification must describe specifics related to the proposal).

(c) Discussion

The lack of clear procedures for the timely acknowledgment of and response to the range of GAC inputs by the Board may impede the policy development process, as the GAC may feel compelled to restate its positions when it has not received a sufficient response. Receiving timely notice of pending proposals also appears to be an area needing procedural and substantive improvements. The GAC's repeated Communiqués on the use of geographic names as top-level domains indicate it had not received a sufficient response from the Board on this issue.

The responsibilities of the GAC Liaison to the Board are ambiguous. The Bylaws do not specify the proactive responsibilities of the Liaisons beyond being "volunteers" with the ability to "attend Board meetings, participate in Board discussions and deliberations" and access "materials."¹⁰⁰ It seems likely that the Board and the GAC's differing interpretations of Liaison responsibilities may underlie some of the communication problems identified above.

(d) Recommendation

- Revise and observe procedures for timely Board responses to GAC submissions. Determine whether the Board and GAC would benefit from more frequent joint meetings. Clarify roles and responsibilities in communicating Board requests for GAC advice, including the role of the GAC Liaison to the Board in this process.

ENDNOTES

- ¹ ICANN, Affirmation of Commitments, paragraph 9.1, September 30, 2009, <http://www.icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm>.
- ² ICANN, “Applications Received for the Accountability and Transparency Review,” April 12, 2010, <http://www.icann.org/en/reviews/affirmation/review-1-applications-en.htm>.
- ³ ICANN, AoC, paragraph 9.1.
- ⁴ ICANN, “Activities of the Accountability and Transparency Review Team,” <http://www.icann.org/en/reviews/affirmation/activities-1-en.htm>.
- ⁵ ICANN, “Accountability and Transparency Review Team—Selection of Independent Expert and Update on ATRT Review,” August 10, 2010, <http://www.icann.org/en/announcements/announcement-10aug10-en.htm>.
- ⁶ ICANN, “Services Agreement,” August 5, 2010, <http://www.icann.org/en/reviews/affirmation/harvard-services-agreement-05aug10-en.pdf>.
- ⁷ See, e.g., Jonathan Zittrain, “ICANN: Between the Public and the Private,” *Berkeley Technology Law Journal* 14 (1999) and John Palfrey, “The End of the Experiment: How ICANN’s Foray into Global Internet Democracy Failed,” *Harvard Journal of Law and Technology* 17 (2004).
- ⁸ ICANN, “Services Agreement,” August 5, 2010, <http://www.icann.org/en/reviews/affirmation/harvard-services-agreement-05aug10-en.pdf>.
- ⁹ Rolf H. Weber, “Accountability in Internet Governance,” *International Journal of Communications Law & Policy* 13 (2009): 153-167.
- ¹⁰ ICANN, “Accountability and Transparency Frameworks and Principles,” approved February 15, 2008, <http://www.icann.org/en/accountability/frameworks-principles/contents-overview.htm>.
- ¹¹ See Jonathan GS Koppell, “Pathologies of Accountability: ICANN and the Challenge of ‘Multiple Accountabilities Disorder,’” *Public Administration Review* 65 (2005): 94–108; John Palfrey, *The End of the Experiment: How ICANN’s Foray into Global Internet Democracy Failed*, Harvard Public Law Working Paper No. 93/Berkman Center Research Publication No. 2004-02 (2004); Milton Mueller, “ICANN, Inc.: Accountability and participation in the governance of critical Internet resources,” Internet Governance Project, November 16, 2009, <http://www.internetgovernance.org/pdf/ICANNInc.pdf>; and Rolf H. Weber, “Accountability in Internet Governance,” *International Journal of Communications Law & Policy* 13 (2009): 153-167.
- ¹² See Jonathan GS Koppell, “Pathologies of Accountability: ICANN and the Challenge of ‘Multiple Accountabilities Disorder,’” *Public Administration Review* 65 (2005): 94–108.
- ¹³ Milton Mueller, “ICANN, Inc.: Accountability and participation in the governance of critical Internet resources,” Internet Governance Project, November 16 2009, <http://www.internetgovernance.org/pdf/ICANNInc.pdf>, 1.
- ¹⁴ *Ibid.*, 6.
- ¹⁵ See R. Shawn Gunnarson, “A Fresh Start for ICANN,” Kirton & McConkie, June 1, 2010, http://www.techpolicyinstitute.org/files/gunnarson_icann%20white%20paper.pdf, 21. Gunnarson argues that ICANN’s organizational structure is incompatible with genuine accountability to the Internet community: “. . . structure will defeat any effort to resolve these persistent criticisms. The fault lies not in a single person or policy, but in ICANN’s organizational structure. Its board of directors holds unreviewable power over what is, after all, a private corporation. Its origins cast doubt on the legitimacy of its authority.” Similarly, a policy document from the European Union argues that genuine accountability for ICANN hinges on “effective mechanisms for independent scrutiny and review of its Board decisions and independent appeal mechanisms . . . based on international law.” See Council of the European Union, International Management of the Internet Domain Name System, Doc. 11960/09, Annex, July 14, 2009, http://www.se2009.eu/polopoly_fs/1.17222!menu/standard/file/Coreper%20Guidelines%20on%20Internet.pdf, 4.
- ¹⁶ Rolf H. Weber, “Internet governance: Transparency and the governance of the Internet,” *Computer Law & Security Report* 24 (2008): 342–348.
- ¹⁷ ICANN, “ICANN Accountability & Transparency Frameworks and Principles,” approved February 15, 2008, <http://www.icann.org/en/transparency/acct-trans-frameworks-principles-10jan08.pdf>.
- ¹⁸ Milton Mueller, “ICANN, Inc.: Accountability and participation in the governance of critical Internet resources,” Internet Governance Project, November 16, 2009, <http://www.internetgovernance.org/pdf/ICANNInc.pdf>, 18. Also see John Palfrey, “The End of the Experiment: How ICANN’s Foray into Global Internet Democracy Failed,” *Harvard Journal of Law and Technology* 17 (2004).
- ¹⁹ Rolf H. Weber, “Accountability in Internet Governance,” *International Journal of Communications Law & Policy* 13 (2009): 153-167.
- ²⁰ Milton Mueller, “ICANN, Inc.: Accountability and participation in the governance of critical Internet resources,” Internet Governance Project, November 16, 2009, <http://www.internetgovernance.org/pdf/ICANNInc.pdf>.
- ²¹ John Palfrey, “The End of the Experiment: How ICANN’s Foray into Global Internet Democracy Failed,” *Harvard Journal of Law and Technology* 17 (2004), 15.
- ²² See Appendices C–E for full versions.

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- ²³ See Appendices A and B for details.
- ²⁴ See Section II B.1.
- ²⁵ ICANN, “Documentary Information Disclosure Policy,” <http://www.icann.org/en/transparency/didp-en.htm>.
- ²⁶ ICANN, “We Need Your Input to Change the ICANN Website,” July 28, 2006, <http://www.icann.org/en/announcements/website-enhancement-28jul06.htm>.
- ²⁷ Kieren McCarthy, “Help us to improve the ICANN website—online survey,” *ICANN Blog*, June 19, 2009, <http://blog.icann.org/2009/06/help-us-to-improve-the-icann-website-online-survey/>.
- ²⁸ Kieren McCarthy, “Update on website revamp,” *ICANN Blog*, October 20, 2009, <http://blog.icann.org/2009/10/update-on-website-revamp/>.
- ²⁹ ICANN, “ICANN Board Resolutions Wiki Launched—Public Comment Encouraged,” June 21, 2010, <http://www.icann.org/en/announcements/announcement-21jun10-en.htm>.
- ³⁰ ICANN Bylaws, Article III, Section 7.
- ³¹ ICANN, “DIDP Requests and Responses,” <http://www.icann.org/en/transparency/didp-requests-and-responses-en.htm>.
- ³² ICANN, “Documentary Information Disclosure Policy,” <http://www.icann.org/en/transparency/didp-en.htm>.
- ³³ *Ibid.*
- ³⁴ *Ibid.*
- ³⁵ ICANN, “Accountability and Transparency Frameworks and Principles: Accountability in the Public Sphere,” approved February 15, 2008, <http://www.icann.com/en/accountability/frameworks-principles/public-sphere.htm>.
- ³⁶ ICANN, “Dashboard: ICANN Performance Metrics—Refreshed,” <https://charts.icann.org/public/>.
- ³⁷ John Palfrey, “The End of the Experiment: How ICANN’s Foray into Global Internet Democracy Failed,” *Harvard J. of L. and Tech.* 17 (2004).
- ³⁸ *Ibid.*, 3.
- ³⁹ ICANN Bylaws, Article I, Section 2.4, August 5, 2010, <http://www.icann.org/en/general/bylaws.htm>.
- ⁴⁰ *Ibid.*, Article III, Section 6. Article III also contains provisions related to a Manager of Public Participation and the maintenance of the ICANN website. Annexes A and B address standards for participation within the GNSO and ccNSO Policy Development Processes.
- ⁴¹ ICANN, “Accountability and Transparency Frameworks and Principles,” approved February 15, 2008, <http://www.icann.org/transparency/acct-trans-frameworks-principles-10jan08.pdf>.
- ⁴² ICANN, “Document Publication Operational Policy,” <http://www.icann.org/en/participate/draft-document-publication-operational-policy-en.pdf>. The policy “encourage[s] the early sharing of documentation...for public review and discussion” at ICANN meetings.
- ⁴³ ICANN, AoC, paragraph 9.1.
- ⁴⁴ ICANN Bylaws (“New Bylaws”), Article III, Section 3, December 15, 2002, <http://www.icann.org/en/general/archive-bylaws/bylaws-15dec02.htm>.
- ⁴⁵ Nick Ashton-Hart, “Remote Participation for Nairobi: Details Available,” *ICANN Blog*, February 16, 2010, <http://blog.icann.org/2010/02/remote-participation-for-nairobi-details-available/>.
- ⁴⁶ ICANN, “Public Participation Committee of the Board: Proposed Work Programme for 2010/2011,” March 12, 2010, <http://www.icann.org/en/committees/participation/proposed-work-programme-for-2010-2011-12mar10-en.pdf>.
- ⁴⁷ GNSO, “CCT Final Consolidated Recommendations,” April 9, 2010, <http://gnso.icann.org/drafts/cct-consolidated-report-final-09apr10-en.pdf>.
- ⁴⁸ GNSO, “Council Resolutions,” June 23, 2010, <http://gnso.icann.org/resolutions/#201006>.
- ⁴⁹ ICANN, “Strategic Plan Survey,” November 19, 2009, <http://www.icann.org/en/announcements/announcement-19nov09-en.htm>.
- ⁵⁰ See European Commission, “Codecision: Ordinary Legislative Procedure ‘Step by Step’,” http://ec.europa.eu/codecision/stepbystep/text/index_en.htm#1; and European Commission, “Steps in the Strategy: Strategic Planning and Programming,” http://ec.europa.eu/atwork/strategicplanning/index_en.htm. See also Wikimedia, “Strategic Planning Process,” <http://strategy.wikimedia.org/wiki/Process>; and Wikimedia, “Strategic Plan Priorities,” http://strategy.wikimedia.org/wiki/Strategic_Plan/Movement_Priorities.
- ⁵¹ See Henry Chesbrough, *Open Innovation: The New Imperative For Creating and Profiting From Technology* (Boston: Harvard Business School Press, 2006).
- ⁵² ICANN, “ICANN Meeting Fellowships,” <http://www.icann.org/en/fellowships/>. See also ICANN, “Webinars,” <http://www.icann.org/en/learning/webinars.htm>; ICANN, “Preliminary Report: Resolutions of Special Board Meeting,” May 21, 2009, <http://www.icann.org/en/minutes/prelim-report-21may09.htm>.
- ⁵³ ICANN, “Public Participation Committee of the Board: Proposed Work Programme for 2010/2011,” March 12, 2010, <http://www.icann.org/en/committees/participation/proposed-work-programme-for-2010-2011-12mar10-en.pdf>.

Much of ICANN's work happens remotely—according to the Board Public Participation Committee, “the largest proportion of interaction between community members happens intersessionally where the participants are *all* remote participants.”

⁵⁴ Kieren McCarthy, “Public Participation: my ICANN leaving report,” December 1, 2009, <http://kierenmccarthy.com/2009/12/01/public-participation-my-icann-leaving-report/>.

⁵⁵ The GNSO Policy Development Process Work Team is considering a “fast-track” option to enable urgent action where needed while still ensuring broad community participation. This proposal is supported by the ALAC: see ICANN, “At-Large GNSO Liaison,” https://st.icann.org/gns0-liaison/index.cgi?at_large_gns0_liaison.

⁵⁶ For example, the United States government's online public participation forums allow participants to vote comments and suggestions up and down and to respond to individual submissions. Comments are tagged according to category, ranked according to the amount of user activity they generate, and given a score on a “controversy meter” that indicates the ratio between the number of up and down votes they receive. Community members may also be engaged in the translation of comments and related documents. See Open Government Dialogue, <http://opengov.ideascale.com>.

⁵⁷ ICANN, “Public Comments Index Against ATRT Work Teams and Highlights,” August 20, 2010, <http://www.icann.org/en/reviews/affirmation/index-of-public-comments-20aug10-en.pdf>.

⁵⁸ See Roselle L. Wissler, “Court-Connected Mediation In General Civil Cases: What We Know from Empirical Research,” *Ohio State Journal on Dispute Resolution* 17 (2002), 641–690. Wissler concludes that people felt that “they had an opportunity to tell their side of the story, they participated actively in the process, they had considerable input in determining the outcome of the dispute and they were not pressed by the mediator or others to settle.” See also Patrick Field, et al., “Integrating Mediation in Land Use Decision Making,” Consensus Building Institute, January 2010, 38. Field finds that mediation participants had a “willingness to participate in mediation despite indications by many that their most recent experience with mediation did not result in an agreement that satisfied them.”

⁵⁹ ICANN, AoC, paragraph 9.1(e).

⁶⁰ ICANN, “Public Comment: Community Working Group Report on Implementation of GNSO New gTLD Recommendation Number 6,” September 22, 2010, <http://www.icann.org/en/announcements/announcement-2-22sep10-en.htm>.

⁶¹ ICANN Bylaws, Article VI, Section 2.

⁶² *Ibid.*, Article IV, Section 3.

⁶³ ICANN, “Adopted Board Resolutions, Cairo,” November 7, 2008, http://www.icann.org/en/minutes/resolutions-07nov08.htm#_Toc87682575. For a list of current Board committees, see: ICANN, “Board Committees,” http://www.icann.org/en/committees/board_committees.html.

⁶⁴ *Ibid.*

⁶⁵ The Boston Consulting Group and Colin Carter & Associates, *Independent Review of the Board of ICANN*, 2008.

⁶⁶ *Principles of Corporate Governance* (American Law Institute: 1994), § 3.01.

⁶⁷ James Fishman and Stephen Schwarz, *Nonprofit Organizations: Statutes, Regulations, and Forms* (New York: Foundation Press; 2006), 142–143.

⁶⁸ ICANN, “Public Comments Index Against ATRT Work Teams and Highlights,” August 20, 2010, <http://www.icann.org/en/reviews/affirmation/index-of-public-comments-20aug10-en.pdf>.

⁶⁹ ICANN, “Adopted Board Resolutions | Brussels,” June 25, 2010, <http://www.icann.org/en/minutes/resolutions-25jun10-en.htm>.

⁷⁰ Kieren McCarthy, “ICANN board briefing materials; more cover pages than information,” August 17, 2010, <http://kierenmccarthy.com/2010/08/17/icann-board-briefing-materials-more-cover-pages-than-information/>.

⁷¹ ICANN, “ICANN Board Resolutions—Draft—2009,” <https://community.icann.org/display/ctap/Board+Resolutions>. The wiki is still in draft form and does not appear to be open to direct input from community members. Comments are invited via an “Add Comments” box on the wiki, which is not available as of October 7, 2010, or via a public comments forum (the period lasted from June 21–July 26, 2010; no comments were submitted). The projected date for completion is December 5–10, 2010, during ICANN's 39th International Public Meeting in Cartagena.

⁷² ICANN's Bylaws describe each mechanism: Article V (Ombudsman); Article IV, Section 2 (Reconsideration Requests); and Article IV, Section 3 (Independent Review Panel).

⁷³ ICANN Bylaws, Article IV, Section 1.

⁷⁴ *Ibid.*, Article V, Section 2.

⁷⁵ See Section II B.2.

⁷⁶ ICANN proposed the community re-vote process in July 2009, posting a draft for public comment at ICANN, “Public Comment: Proposed Bylaw Changes to Improve Accountability,” July 27, 2009, <http://www.icann.org/en/announcements/announcement-27jul09-en.htm>. Interviewees have suggested a variety of additional review mechanisms, including the concept of an independent judiciary body tasked with hearing and evaluating arguments about the ICANN Board's decisions and activities. Rolf H. Weber and the Center for Democracy & Technology have both called for the creation of a similar judicial review process based on international law; see Weber, *Shaping Internet Governance: Regulatory Challenges* (New York: Springer, 2010), 103 and Center for Democracy &

Technology, “Independence and Accountability: The Future of ICANN,” June 8, 2009, http://www.cdt.org/international/20090608_icann.pdf. See also R. Shawn Gunnarson, “A Fresh Start for ICANN,” Kirton & McConkie, June 1, 2010, http://www.techpolicyinstitute.org/files/gunnarson_icann%20white%20paper.pdf.

⁷⁷ ICANN, “Limitations on Third Party Review of Corporate Board Actions under California Law: Supplied by ICANN,” August 31, 2010, <http://icann.org/en/reviews/affirmation/third-party-review-of-Board-actions-31aug10-en.pdf>.

⁷⁸ ICANN Bylaws, Article XI, Section 2.1(a).

⁷⁹ *Ibid.*, Article XI, Section 2.1(i).

⁸⁰ Compare ICANN Bylaws, Article III, Section 6.1(c) (emphasis supplied) with Article XI, Section 2.1(a).

⁸¹ See ICANN Bylaws, Article III, Section 6 et seq., and Article XI, Section 2.1, et seq.

⁸² See ICANN, “Correspondence,” <http://www.icann.org/en/correspondence> and GAC, “Communiqués,” <http://gac.icann.org/communiques>. To date, the GAC has issued 38 Communiqués and submitted 23 letters addressed to the Board, individual Board members, and ICANN.

⁸³ See e.g., Mohamed Sharil Tarmizi to Paul Twomey, April 3, 2005, ICANN Correspondence, <http://www.icann.org/en/correspondence/tarmizi-to-twomey-03apr05.pdf>; Mohamed Sharil Tarmizi to ICANN Board of Directors, August 12, 2005, ICANN Correspondence, <http://www.icann.org/en/correspondence/tarmizi-to-board-12aug05.htm>; Peter Zangl to Vint Cerf, September 16, 2005, ICANN Correspondence, <http://www.icann.org/en/correspondence/zangl-to-cerf-16sep05.pdf>; Jonas Bjelfvenstam to Paul Twomey, November 23, 2005, ICANN Correspondence, <http://www.icann.org/en/correspondence/bjelfvenstam-to-twomey-23nov05.htm>; Peter Zangl to Vint Cerf, March 17, 2006, ICANN Correspondence, <http://www.icann.org/en/correspondence/zangl-to-cerf-17mar06.pdf>; Martin Boyle to Vinton Cerf, May 4, 2006, ICANN Correspondence, <http://www.icann.org/en/correspondence/boyle-to-cerf-09may06.htm>; and Helen Coonan to Vint Cerf, February 28, 2007, ICANN Correspondence, <http://www.icann.org/en/correspondence/coonan-to-cerf-28feb2007.pdf>.

⁸⁴ See e.g., Mohamed Sharil Tarmizi to Paul Twomey, April 3, 2005, ICANN Correspondence, <http://www.icann.org/en/correspondence/tarmizi-to-twomey-03apr05.pdf>; Peter Zangl to Vinton Cerf, September 16, 2005, ICANN Correspondence, <http://www.icann.org/en/correspondence/zangl-to-cerf-16sep05.pdf>; Jonas Bjelfvenstam to Paul Twomey, November 23, 2005, ICANN Correspondence, <http://www.icann.org/en/correspondence/bjelfvenstam-to-twomey-23nov05.htm>; and Peter Zangl to Vint Cerf, March 17, 2006, ICANN Correspondence, <http://www.icann.org/en/correspondence/zangl-to-cerf-17mar06.pdf>.

⁸⁵ GAC, “GAC Communiqué—Luxembourg,” July 12, 2005, http://gac.icann.org/system/files/GAC_23_Luxembourg.pdf; GAC, “GAC Communiqué—Vancouver,” December 2005, http://gac.icann.org/system/files/GAC_24_Vancouver_Communique.pdf; GAC, “GAC Communiqué—Wellington,” March 28, 2006, http://gac.icann.org/system/files/GAC_25_Wellington_Communique.pdf; GAC, “GAC Communiqué—Lisbon,” March 28, 2007, http://gac.icann.org/system/files/GAC_28_Lisbon_Communique.pdf.

⁸⁶ ICANN Bylaws, Article XI, Section 2.1(h), (j), (k).

⁸⁷ *Ibid.*, Article XI, Section 2.1(h).

⁸⁸ *Ibid.*, Article III, Section 6.1(c).

⁸⁹ As discussed in the previous section, the definition of “advice” is not precisely defined in the Bylaws, and in some limited cases this term is used interchangeably with “opinion.” For the purposes of this section, this report uses the term “advice” to encompass both advice and opinion as intended in the Bylaws.

⁹⁰ ICANN Bylaws, Article XI, Section 2.1(j).

⁹¹ *Ibid.*, Article XI, Section 2.1(j).

⁹² *Ibid.*, Article XI, Section 2.1(k).

⁹³ *Ibid.*, Article XI, Section 9.1(a); Article XI, Section 2.1(f).

⁹⁴ *Ibid.*, Article VI, Section 9.5.

⁹⁵ *Ibid.*, Article VI, Section 9.5.

⁹⁶ The current interim GAC Chair and Liaison to the Board is Heather Dryden: ICANN, “Heather Dryden Biography,” <http://icann.org/en/biog/dryden.htm>. Previous GAC Chair persons and Liaisons were Janis Karklins (2007- 2010), Mohamed Sharil Tarmizi (2002-2007), and Paul Twomey (1999-2002). Cf. ICANN, “Biography of Ambassador Janis Karklins,” <http://icann.org/en/biog/karklins.html>; ICANN, “Biography of Mohamed Sharil Tarmizi,” <http://icann.org/en/biog/tarmizi.htm>; ICANN, “Biography, Paul Twomey,” <http://icann.org/en/biog/twomey.htm>.

⁹⁷ ICANN Bylaws, Article XI, Section 2.1(h).

⁹⁸ See e.g., Marcelo de Carvalho Lopes to Mohamed Sharil Tarmizi, September 6, 2005, ICANN Correspondence, <http://www.icann.org/en/correspondence/lopez-to-tarmizi-06sep05.pdf>.

⁹⁹ ICANN Bylaws, Article XI, Section 2.1(h).

¹⁰⁰ *Ibid.*, Article VI, Section 9.5.

Appendix A: Workplan

Project Phases

The Berkman team outlined a three phase process: Phase 1—problem identification: case studies; Phase 2—problem discussion and identification of potential solutions; and Phase 3—synthesis and recommendations.

- In Phase 1 the Berkman team initiated a multi-layered fact-finding process aimed at identifying key issues, challenges, and areas of disagreement related to recent decisions and actions by ICANN, with an emphasis on issues related to participation, transparency, and accountability.
- In Phase 2, the Berkman team conducted interviews with select experts, staff members, and stakeholders to discuss the problem areas identified in Phase 1 and to explore potential solutions. Phase 2 identified zones of convergence and divergence regarding both the perceived quality of ICANN’s decisions along these various dimensions and potential solutions to deal with the underlying challenges.
- Based on a rich body of academic literature, Phase 3 of the study developed an exploratory model intended to help examine the various factors that shape the perceived legitimacy of ICANN and its decision-making processes and to make visible the interplay among these variables. The diagnostic model includes a taxonomy of issues and challenges identified in Phases 1 and 2, described in more depth in Section III C above.

Overview of Activities and Outputs

Activities	Draft outputs	Consultation
Phase 1	<ul style="list-style-type: none"> • Rapid, initial review of public submissions from January 2008 to June 17, 2010 in order to identify main areas of concern expressed by various stakeholders and creation of a tentative issues map that informs the fact-finding process (e.g., the drafting of an interview questionnaire, see below). • Initial review of selected academic articles and scholarly works, plus the creation of an initial annotated bibliography that informs, both directly or indirectly, the team's work as it relates to the review process. • Engaged in the collection of a representative sample of materials (including, for example, ICANN publications, independent reports and reviews, and public comments) that enable a bottom-up and problem-oriented analysis. • Drafted interview questionnaires related to the three case studies. 	<p>Aug. 27, 2010 Progress Report:</p> <ul style="list-style-type: none"> • Draft Interview Protocol and Questionnaires • Draft Public Input Memo • Draft Working Hypotheses • Preliminary Annotated Bibliography • Feedback on ATRT Survey to the Community <p>Aug. 16, 2010: ATRT meeting</p> <p>Aug. 29, 30, 2010: ATRT Beijing workshop</p> <p>Sept 6, 2010: ATRT meeting</p>

Activities	Draft outputs	Consultation
Phase 2	<ul style="list-style-type: none"> Revised the draft interview questionnaires for staff, related to the three case studies, in the light of the feedback received by ATRT in the context of the Beijing meeting. Designed a written questionnaire that is specifically geared towards GAC members. Creating customized questionnaires—based on specific areas of expertise or experience—for non-staff members. Distributed staff and GAC questionnaires. Developed criteria for interviewee nominations and shared a list of proposed interviewees with the ATRT. Conducted over 40 interviews. Reviewed and commented on the WG template developed by the ATRT. Reviewed and commented on the draft issues papers prepared by the ATRT's WGs. Defined the interfaces between the Berkman team and the ATRT's WGs within the feedback on the received WG draft issues papers (WG #1, 2, and 4). Prepared a memorandum on transparency issues. Prepared a draft case study on the introduction of new gTLDs. 	<p>Sept. 13, 2010: Midterm Report:</p> <ul style="list-style-type: none"> Feedback on the ATRT's Working Group Template Feedback on Issues Reports by the ATRT's Working Groups Draft List of Proposed Interviewees Revised Interview Protocol and Questionnaires for Staff and the GAC Draft Case Study on the Introduction of New gTLDs Draft Transparency Memorandum Sept. 30, 2010: Draft Case studies: <ul style="list-style-type: none"> The introduction of new gTLDs, specifically, the Expression of Interest proposal, the Implementation Recommendation Team, the role of the Governmental Advisory Committee (GAC), and vertical integration The .xxx top-level domain, specifically, the review process (Independent Review Panel) and interaction between the GAC and the Board The DNS-CERT proposal <p>Sept. 14, 2010: ATRT meeting</p> <p>Sept 20, 2010: ATRT meeting</p> <p>Sept. 29, 2010: ATRT meeting</p>

Activities	Draft outputs	Consultation
Phase 3	<ul style="list-style-type: none"> • Draft recommendations. • Reviewed recommendations with ATRT. • Reviewed recommendations with subject matter experts. • Conducted interviews with Board members, CEO and General Counsel. 	<p>Oct. 8, 2010: Working document:</p> <ul style="list-style-type: none"> • Recommendations • Case studies <p>Oct. 20, 2010: Final report:</p> <ul style="list-style-type: none"> • Recommendations • Case studies • Methodologies <p>Oct. 6, 2010: Berkman meeting with ATRT chair</p> <p>Oct 11-13, 2010: ATRT Boston meeting</p>

Appendix B: Interview Methodology

In addition to publicly available sources, the case studies are informed by the observations of a selected, diverse group of stakeholders and experts who have been interviewed during the course of our analysis. These interviews provide an important supplemental source of information because they convey observations regarding the perception and interpretation of ICANN decisions by the broader community, in addition to confirming the facts of each case. The statements of interviewees do not reflect the opinions or conclusions of the Berkman team.

From September 10–October 16, 2010 the Berkman team conducted 45 interviews. Our interviewees included representatives from the GNSO constituencies, the GAC, ICANN staff, ccTLDs and many more. There were 32 interviewees who discussed the new gTLD process, 15 interviewees who discussed the DNS-CERT proposal, and 7 interviewees who discussed aspects of the .xxx process, with some interviewees addressing questions related to more than one case study. In addition, we received completed questionnaires from 6 GAC representatives.

While the Berkman team has made every effort to remove factual inaccuracies, it does not attest to the accuracy of the observations offered by interviewees.

Interview Protocol

Interviews were conducted by telephone by the Berkman team using questionnaires customized for the individual interviewee. Considerable latitude was offered to interviewees to allow them to explore topics and issues that they felt were relevant and important to the Berkman Center study. The interviews were conducted on the condition of confidentiality. Comprehensive notes were taken during the interviews and subsequently summarized for the research team. The names of the interviewees have been removed from the notes and summaries.

Thus far, ICANN staff interviews have taken place as a two-step process, with the opportunity to provide written responses to our customized questionnaires, followed by a phone call with the Berkman Center team, designed to clarify, where necessary, some of the written answers and to dig deeper into written responses. In the case of the GAC, the Berkman team took a broad-based approach by distributing a written questionnaire, with the aim of following up directly, where possible, with particular members who may have had more substantial involvement in the cases.

All ICANN staff interviews and written responses to questionnaires have been coordinated by ICANN’s Advisor to the President, Denise Michel. The responses to the questionnaires were collected and aggregated by ICANN prior to submission to the Berkman team. ICANN’s General Counsel, John Jeffrey, has attended the phone interviews with ICANN staff members at his request.

Interview Selection

For each case study, the Berkman team identified criteria by which to select interviewees (for further details, see the “Selection Criteria and Proposed Interviewees” memo in the Midterm

Report to ATRT). The proposed interview candidates who met these criteria were then cycled with ATRT members as well as Denise Michel (ICANN staff) for additional nominations. The Berkman team contacted each of these 61 candidates, followed up to ensure we had interviewees who met each of the selection criteria.

Interviewee List

Donna Austin	David Maher
Rod Beckstrom	Frank March
Doug Brent	Kieren McCarthy
Eric Brunner-Williams	Steve Metalitz
Becky Burr	Denise Michel
Vint Cerf	Margie Milam
Edmon Chung	Keith Mitchell
Mason Cole	Ram Mohan
Lesley Cowley	Milton Mueller
Steve Crocker	Peter Nettlefold
Keith Davidson	Jon Nevett
Avri Doria	Mike Palage
Zahid Jamil	Kurt Pritz
John Jeffrey	Greg Rattray
Rodney Joffe	Kristina Rosette
Dan Kaminsky	George Sadowsky
Kathy Kleiman	Suzanne Sene
John Kneuer	Werner Staub
Konstantinos Komaitis	Jean-Jacques Subrenat
Dirk Krischenowski	Bruce Tonkin
Bertrand de La Chapelle	Karla Valente
Stuart Lawley	Antony Van Couvering
Karen Lentz	

Appendix C: The Introduction of New gTLDs

Abstract

In June of 2008, the ICANN Board unanimously adopted the GNSO's policy recommendations for the introduction of new generic top-level domain names (gTLDs) and resolved to begin work on the implementation of a new gTLD application process. The new program, initially scheduled to launch in September 2009, is still under development.

The proposed process has been fraught with controversy, including criticisms over its delays, whether ICANN's method of publishing and incorporating public comments is sufficiently transparent and responsive, and whether new gTLDs should even exist. Critics have also raised a number of specific substantive issues, including the Expression of Interest proposal, trademark protection, the role of the Governmental Advisory Committee, the proposed morality and public order standard for objections to new gTLDs, and vertical integration.

Case Study Sources and Methodology

For more information on our sources and methodology, please see Appendix A.

This case study is based on publicly available materials, including public comments, ICANN documents, academic studies, media reports and expert opinions. It provides a summary of the facts regarding the introduction of new gTLDs. As per Exhibit B, section 1 of the Services Agreement between the Berkman Center and ICANN, its goal is to help identify key issues, challenges and areas of disagreement related to the new generic top-level domain name (gTLD) program. The observations below will contribute to the Berkman team's final report.

In addition to publicly available sources, this case study includes statements, opinions and perceptions of those we interviewed in the course of developing this case. These perceptions and opinions play an important role in the interpretation of ICANN decisions and their reception by the community. The statements of interviewees do not reflect the opinions or conclusions of the study team. While we have made every effort to remove factual inaccuracies, we do not attest to the accuracy of the opinions offered by interviewees. The interviews were conducted on the condition of confidentiality.

Note: As per the Services Agreement, this case study focuses on events prior to June 17, 2010. However, the new gTLD program is still evolving. As such, this study may not reflect the most recent developments in this case.

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1 Introduction

One of ICANN's roles, as articulated in its Articles of Incorporation, is "performing and overseeing functions related to the coordination of the Internet domain name system ("DNS"), including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system."¹ Since the 1980s, the DNS has contained seven gTLDs (.com, .edu, .gov, .int, .mil, .net, and .org), three of which—.com, .net, and .org—are open for public registration.² In 2000, ICANN issued a call for proposals for new gTLDs. Between late 2000 and 2004, it introduced seven new gTLDs: .aero, .biz, .coop, .info, .museum, .name and .pro. In 2005, ICANN announced five more approved sponsored TLDs—.cat, .jobs, .mobi, .tel, and .travel—bringing the total number to twenty-one.³

In October 2007 the Generic Names Supporting Organization (GNSO)⁴ finalized a list of policy recommendations on the introduction of new gTLDs,⁵ in line with ICANN's stated commitment to "introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest."⁶ The ICANN Board approved these recommendations in June 2008, and staff began work on a new Draft Applicant Guidebook (DAG) four months later.

The DAG is currently in its fourth iteration, published on May 31, 2010. The timeline on the New gTLD Program section of ICANN's website estimates that the final Applicant Guidebook will be published some time in 2010 and lists the date of program launch as "to be determined."⁷

2 Proposed Application Process

According to the current (fourth) version of the DAG, applicants for new gTLDs must complete the following steps:

1. Register for the TLD Application System.
2. Submit a partial deposit of \$5000 for each gTLD desired.

¹ ICANN, "Articles of Incorporation," revised November 21, 1998, <http://www.icann.org/en/general/articles.htm>; United States Department of Commerce, Statement of Policy on the Management of Internet Names and Addresses, June 5, 1998, <http://www.icann.org/en/general/white-paper-05jun98.htm>.

² A specialized TLD, .arpa, is reserved for "technical infrastructure purposes." Over 250 country code TLDs (e.g., .uk or .ru) also exist. ICANN, "Top-Level Domains (gTLDs)," <http://www.icann.org/en/tlds/>.

³ On December 11, 2009, ICANN entered into a TLD sponsorship agreement with the Universal Postal Union (UPU), under which the UPU sponsors the .post gTLD. The domain has not yet been added to the root. ICANN, ".POST Sponsored TLD Agreement," December 11, 2009, <http://www.icann.org/en/tlds/agreements/post/>.

⁴ The GNSO is one of three Supporting Organizations (the others being the Address Supporting Organization and the Country Code Names Supporting Organization) that develop and recommend policies to the ICANN Board. Each Supporting Organization also appoints two voting members to the Board.

⁵ GNSO, "Final Report - Introduction of New Generic Top-Level Domains," August 8, 2007, <http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>.

⁶ ICANN, "Bylaws for Internet Corporation for Assigned Names and Numbers," amended June 25, 2010, <http://www.icann.org/en/general/bylaws.htm>.

⁷ ICANN, "New gTLD Program: New to the Program? Start Here!," <http://www.icann.org/en/topics/new-gtlds/program-en.htm>.

3. Complete the full gTLD application and submit the remainder of the evaluation fee (\$180,000, for a total cost of \$185,000).
4. Pass evaluations including:
 - evaluation of the requested string (to determine that it “is not likely to cause security or stability problems in the DNS”);
 - screening for string similarity, including problems caused by “similarity to existing TLDs or reserved names”;
 - screening of the applicant (to determine “whether the applicant has the requisite technical, operational and financial capabilities to operate a registry”); and
 - a background check for the operator and key members.
5. If applicable, sufficiently address any objections made on the grounds of “string confusion, legal rights, morality and public order and/or community.”
6. Undergo a 45-day public comment period.
7. Pass a secondary Extended Evaluation if the application does not meet the criteria for the initial evaluation.
8. Transition to delegation: Complete a registry agreement with ICANN and pass a series of technical tests.⁸

Not all of these steps are necessary for all applicants, and all of these steps are subject to change before the process is finalized and the gTLD program is formally launched. The fourth version of the DAG illustrates the process as follows:

⁸ ICANN, “Draft Applicant Guidebook, Version 4,” May 31, 2010, <http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-28may10-en.pdf>.

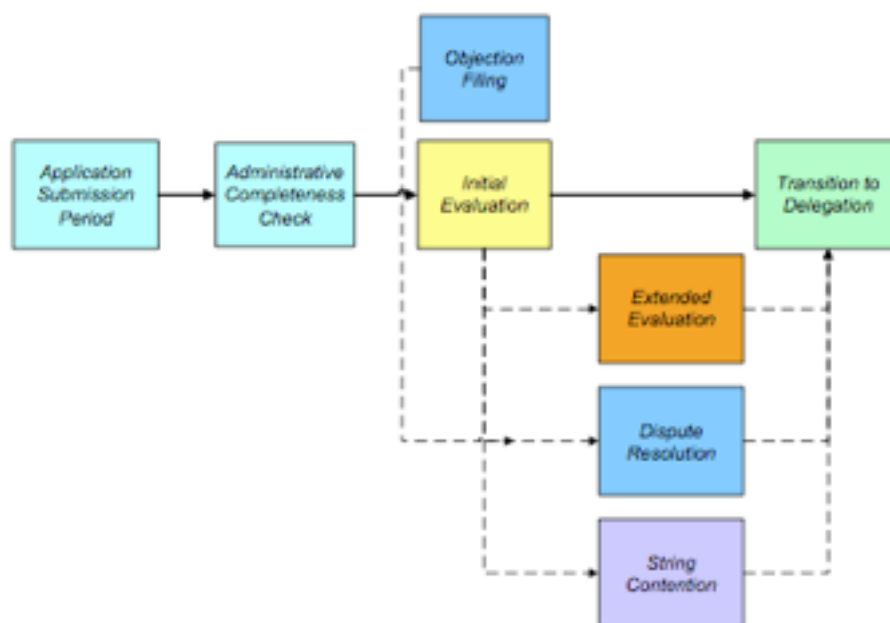


Figure 1-1 – Once submitted to ICANN, applications will pass through multiple stages of processing.

3 Major Issues

ICANN's decision to begin work on a new gTLD application process met with opposition from some in the global business community, including trademark holders and members of the financial sector, as well as a number of governments.⁹ Opponents argued that a gTLD expansion would "create morality, trademark and geographic problems at the top-level," confusing consumers and placing a great financial burden on business owners who would be forced to defensively register both TLDs and second level domains in new TLDs to protect their brands.¹⁰ Other concerns included fears that increasing the number of gTLDs would threaten the stability of the DNS, that the expected benefit to consumers through greater competition would not outweigh the costs associated with such an expansion, and that the new program may invite an increase in criminal conduct such as phishing, malware and botnets. Others, by contrast, complained of ICANN's slowness to commence this proposed expansion, arguing that ongoing

⁹ Michael Palage, "ICANN's gTLD Proposal Hits a Wall: Now What?," *The Progress & Freedom Foundation PFF Blog*, December 22, 2008, http://blog.pff.org/archives/2008/12/icanns_gtld_pro.html.

¹⁰ Richard J Tindal, "Switching on the Light: Expression of Interest for New TLDs," *Circle ID*, February 25, 2010, http://www.circleid.com/posts/switching_on_the_light_expression_of_interest_tlds/.

restriction of the DNS name space is anti-competitive or that the process is being held up by a few powerful voices that do not represent the wider ICANN community.¹¹

3.1 Timeline

ICANN's timeline for the launch of the new gTLD program has been pushed back repeatedly. In June 2008, ICANN estimated that the Applicant Guidebook would be finalized by November 2008 and that the program would launch by early 2009.¹² In response to comments on the first draft of the guidebook indicating that the proposed timeline was too aggressive, in February 2009, ICANN extended the launch date to December 2009. Three months later, ICANN revised the timeline again, pledging to begin accepting applications in early 2010.¹³

At the October 2009 ICANN meeting in Seoul, ICANN faced criticism from potential applicants who claimed, "the timetable hasn't slipped, but has been abandoned" and implored ICANN to "just pick a date." "We're losing faith in this process as we see delay after delay after delay," said one.¹⁴ Interviewees suggested that these delays may be due to the influence of powerful stakeholders who are fundamentally opposed to the widespread expansion of the domain name space. Some interviewees pointed to the ongoing discussion of trademark protection in new gTLDs as an example of an issue where a specific interest group, in this case trademark holders represented in the GNSO Intellectual Property Constituency (IPC), delayed the progress of the new gTLD program. This debate began with the GNSO Working Group on Protecting the Rights of Others in May 2007 and moved through the Implementation Recommendation Team and the GNSO Special Trademark Issues Working Group, which submitted its final report in February 2010.¹⁵ Trademark holders have stated their opposition to the widespread expansion of gTLDs; the IPC has urged the limitation of this expansion.¹⁶ In its June 2009 Communiqué to the Board, the GAC also stressed "the need for more effective protection for intellectual property rights" while stating its support for the introduction of new gTLDs.¹⁷

Other interviewees felt the delays may be due to the over-consideration of public input or to the Board's indecisiveness when faced by a lack of public consensus. These commentators described frustration at seeing issues that had been perceived or even explicitly marked as closed subsequently reopened. Such issues include the morality and public order standard for governmental objections to new gTLDs, which was debated within the GNSO, inserted into the first version of the DAG, and later altered in response to public comments (these alterations and

¹¹ Andrew Alleman, "New gTLD Timeline Slips, Frustration Boils Over in Seoul," *Domain Name Wire*, October 26, 2009, <http://domainnamewire.com/2009/10/26/new-gtld-timeline-slips-frustration-boils-over-in-seoul/>.

¹² ICANN, "New gTLD Program: What kind of internet do you want?," June 23, 2008, http://par.icann.org/files/paris/BAA_Intro_NewGTLDs_Paris_23Jun08.pdf.

¹³ ICANN, "New gTLD Program Update," May 31, 2009, <http://www.icann.org/en/announcements/announcement-07may09-en.htm>.

¹⁴ ICANN, "New gTLD Overview: ICANN Meeting, Seoul, Korea," October 26, 2009, <http://sel.icann.org/meetings/seoul2009/transcript-new-gtlds-program-overview-26oct09-en.txt>.

¹⁵ Interviews, September 2010.

¹⁶ International Trademark Association, "Creation of New gTLDs and Trademark Protection," July 8, 2009, http://www.inta.org/index.php?option=com_content&task=view&id=2005&Itemid=153&getcontent=.

¹⁷ GAC, "GAC Communiqué—Sydney," June 24, 2009, <http://gac.icann.org/system/files/Sydney%20Communique.pdf>.

the initial reasoning behind the standard are described in two explanatory memoranda published by ICANN in October 2008 and May 2009¹⁸).¹⁹ In the introduction to the third version of the DAG, published in October 2009, ICANN President Rod Beckstrom lists “evaluation criteria, dispute resolution standards and procedures, and contention resolution procedures” as being among the areas “where the process of continuous iteration and community feedback is essentially complete.”²⁰ However, in its March 2010 Communiqué to the Board, the Governmental Advisory Committee (GAC) stated that it “believe[d] this item should not be listed on the ‘closed items’ list with respect to the new gTLD process,” argued that the standard was inappropriate, and requested more detail from ICANN staff on how the standard would be implemented.²¹

Other interviewees expressed concerns that by proceeding with implementation of the GNSO recommendations before thoroughly responding to community concerns over the necessity for a gTLD expansion—which would include a thorough economic analysis and demonstrating the capability of the root to scale successfully—ICANN has created controversies that could have been avoided.²²

In other interviews, it was suggested that the delays are a necessary part of the bottom-up, multi-stakeholder approach to which ICANN is committed.²³

3.2 “Overarching Issues”

Based on public comments on the first version of the Draft Applicant Guidebook, ICANN identified four “Overarching Issues” related to the introduction of new gTLDs: 1) Trademark Protection; 2) Potential for Malicious Conduct; 3) Security and Stability/Root Zone Scaling; and 4) TLD Demand and Economic Analysis.²⁴

3.2.1 Trademark Protection

In response to trademark-related concerns raised in public comments on the first draft of the DAG, ICANN pledged to discuss trademark issues stemming from the introduction of new gTLDs “with all relevant parties” and with Intellectual Property organizations around the world. On March 6, 2009, the ICANN Board resolved to direct the GNSO’s Intellectual Property Constituency, in conjunction with ICANN staff, to form an Implementation Recommendation

¹⁸ ICANN, “New gTLD Program Explanatory Memorandum: Morality and Public Order Objection Considerations in New gTLDs,” October 29, 2008, <http://www.icann.org/en/topics/new-gtlds/morality-public-order-draft-29oct08-en.pdf>; ICANN, “New gTLD Program Explanatory Memorandum: Standards for Morality and Public Order Research,” May 30, 2009, <http://www.icann.org/en/topics/new-gtlds/morality-public-order-30may09-en.pdf>.

¹⁹ Interviews, September 2010.

²⁰ ICANN, “Draft Applicant Guidebook, Version 3,” October 4, 2009, <http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-04oct09-en.pdf>.

²¹ “GAC Communiqué—Nairobi,” March 10, 2010, http://gac.icann.org/system/files/Nairobi_Communique.pdf.

²² Interviews, September 2010.

²³ Interviews, September 2010.

²⁴ ICANN, “New gTLD Draft Applicant Guidebook: Analysis of Public Comment,” February 18, 2009, <http://www.icann.org/en/topics/new-gtlds/agv1-analysis-public-comments-18feb09-en.pdf>.

Team (IRT) to address trademark concerns.²⁵ For additional information on the IRT, please see section 3.3 of this report.

3.2.2 Potential for Malicious Conduct

In February 2009, ICANN promised to “actively solicit[] feedback” on the potential for malicious conduct (specifically criminal conduct: phishing, pharming, malware, botnets) in the new DNS namespace.²⁶ ICANN set up a wiki to address all four “overarching issues” in April 2009; as of mid-August 2010 only two comments had been posted directly to the wiki.²⁷ In December 2009, ICANN staff announced that it would establish two temporary groups of experts to address these issues.²⁸ These two groups, the Zone File Access (ZFA) Advisory Group and the High Security op-Level Domain Advisory Group (HSTLD), published a set of documents on malicious conduct within new gTLDs and held two workshops at the March 2010 ICANN meeting in Nairobi.²⁹

3.2.3 Security and Stability/Root Zone Scaling

The ICANN Board delegated work on the security and stability issue to the Security and Stability Advisory Committee and the Root Server System Advisory Committee, which jointly conducted a study analyzing the impact of the proposed gTLD expansion on security and stability within the DNS root server system. A report on root scaling was published on August 31, 2009; a study on root zone augmentation and impact analysis followed on September 17, 2009.³⁰

3.2.4 TLD Demand and Economic Analysis

In October 2006, the ICANN Board resolved to direct the President of ICANN to:

commission an independent study by a reputable economic consulting firm or organization to deliver findings on economic questions relating to the domain registration market, such as:

- *whether the domain registration market is one market or whether each TLD functions as a separate market,*
- *whether registrations in different TLDs are substitutable,*
- *what are the effects on consumer and pricing behavior of the switching costs involved in moving from one TLD to another,*

²⁵ ICANN, “Adopted Board Resolutions — Mexico,” March 6, 2009, <http://www.icann.org/en/minutes/resolutions-06mar09.htm>.

²⁶ ICANN, “New gTLD Draft Applicant Guidebook: Analysis of Public Comment,” February 18, 2009, <http://www.icann.org/en/topics/new-gtlds/agv1-analysis-public-comments-18feb09-en.pdf>.

²⁷ ICANN, “New gTLD Overarching Issues,” http://st.icann.org/new-gtld-overarching-issues/index.cgi?new_gtld_overarching_issues.

²⁸ ICANN, “Temporary Expert Advisory Groups Formed on New gTLD Malicious Conduct Initiatives,” December 3, 2009, <http://www.icann.org/en/announcements/announcement-03dec09-en.htm>.

²⁹ ICANN, “Mitigating Malicious Conduct in New gTLD—Zone File Access and High Security Zone TLD,” February 22, 2010, <http://www.icann.org/en/announcements/announcement-22feb10-en.htm>.

³⁰ ICANN, “Security and Stability: Root Zone Scaling,” https://st.icann.org/new-gtld-overarching-issues/index.cgi?security_and_stability_root_zone_scaling.

- *what is the effect of the market structure and pricing on new TLD entrants, and*
- *whether there are other markets with similar issues, and if so how are these issues addressed and by who?*³¹

In its resolution, the Board stated that its decision to call for an independent study was motivated by public comments “concerning competition-related issues such as differential pricing” with respect to proposed new registry agreements between ICANN and the operators of the .biz, .info and .org registries, which had been posted for comment in July 2006.³²

In a December 18, 2008 letter to ICANN’s CEO and Board Chairman, the United States Department of Commerce, on behalf of the US government, expressed concerns that the publication of the first draft of the DAG had preceded the completion of this study.³³ Several other groups, including the National Association of Manufacturers,³⁴ AT&T,³⁵ and the Internet Commerce Coalition³⁶ also expressed concerns that ICANN had not yet filled its obligation to conduct a thorough economic study prior to releasing the DAG.³⁷

Some interviewees also expressed concerns that this analysis still remains to be satisfactorily conducted, while others believed the economic studies ICANN has commissioned have been helpful in informing the debate over vertical integration between registries and registrars (for more information on this debate, see “Vertical Integration” below).³⁸

In March 2009, ICANN released two studies by University of Chicago economist Dennis Carlton, one on the impact of gTLDs on consumer welfare and one on the possibility of price caps on the prices charged by new gTLD registries for second level domains. In these studies, Carlton concluded that the introduction of new gTLDs would “improve consumer welfare by facilitating entry and creating new competition.... The likely effect of ICANN’s proposal is to increase output, lower price and increase innovation.” He also stated that price caps on new TLDs were “unnecessary” and that imposing price caps may harm the marketplace by placing limits on the pricing flexibility of new registries without providing many benefits to registrants.³⁹

³¹ ICANN, “Adopted Resolutions from ICANN Board Meeting,” October 18, 2006, <http://www.icann.org/en/minutes/resolutions-18oct06.htm>.

³² ICANN, “Proposed .BIZ, .INFO and .ORG gTLD Registry Agreements,” July 28, 2006, <http://www.icann.org/en/announcements/announcement-2-28jul06.htm>.

³³ Meredith A. Baker, United States Department of Commerce, “Letter to Chairman Dengate-Thrush,” December 18, 2008, <http://www.icann.org/correspondence/baker-to-dengate-thrush-18dec08-en.pdf>.

³⁴ National Association of Manufacturers, “Industry Comments to the New GTLD Program and Process,” December 15, 2009, <http://forum.icann.org/lists/gtld-guide/pdf7xgwqYBTl6.pdf>.

³⁵ AT&T, “AT&T Comments on New gTLD Guidebook,” December 15, 2008, <http://forum.icann.org/lists/gtld-guide/docvN9GJ3ZMCd.doc>.

³⁶ Internet Commerce Coalition, “Comments on the New gTLD Program and Process,” December 15, 2008, <http://forum.icann.org/lists/gtld-guide/pdfwiBzRRbU1A.pdf>.

³⁷ Michael Palage, “ICANN’s Economic Reports: Finding the Missing Pieces to the Puzzle,” *Progress Snapshot* 5.4, April 2009, http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1494671_code759757.pdf?abstractid=1494671&mirid=1.

³⁸ Interviews, September 2010.

³⁹ ICANN, “New gTLDs—Preliminary Reports on Competition and Pricing,” March 4, 2009, <http://www.icann.org/en/announcements/announcement-04mar09-en.htm>.

After publishing the reports, ICANN opened a 45-day public comment forum, in which they were widely criticized.⁴⁰ Andrew Alleman of the Domain Name Wire blog accused ICANN of “whitewash[ing]” its own positions on new gTLDs and pointed out that Carlton contradicted himself in the reports by saying new gTLDs would benefit consumers by creating competition but that they would not be successful enough to pose a threat to trademark holders.⁴¹ University of Miami law professor and long-time ICANN watcher Michael Froomkin called the studies “naïve” and challenged Carlton’s credibility, pointing out that the studies included very little quantitative data to back up their conclusions.⁴²

In June 2009, ICANN commissioned Carlton to write two new papers responding to these criticisms. Reactions were mixed, with those who criticized the original papers unmoved and others—including several potential gTLD applicants—supporting the papers.⁴³ Between June 2009 and March 2010, the GAC emphasized the “lack of comprehensive analysis of economic and competition impacts” of the new gTLD program in three Communiqués to the Board and a separate letter to Peter Dengate-Thrush. In July 2009, the International Trademark Association Board of Directors passed a resolution stating that “ICANN has yet to commission the independent, comprehensive economic study of the domain name registration market called for by its Board of Directors in 2006” and that, “accordingly, ICANN has demonstrated no adequate economic or public policy justification for the introduction of new gTLDs.”⁴⁴

In September 2009, Larry Smith and Howard Coble, both members of the United States House of Representatives’ Judiciary Committee, sent a letter to Rod Beckstrom stating that “the only economic justification put forth thus far has been an ICANN-commissioned report that has been widely criticized for failing to include empirical data or analysis” and asking whether ICANN intended to follow through on its commitment to carry out an economic study.⁴⁵ Beckstrom responded by pointing to the two reports by Carlton and an October 2008 study on vertical integration by CRA International. He stated that “Even with what appears to be the compelling benefits of competition, ICANN’s commitment to open and transparent processes requires further action on ICANN’s part” and declared that ICANN would “retain economists to review and summarize work to date regarding the costs and benefits of new gTLDs...and then evaluate whether additional study is required.”⁴⁶

⁴⁰ ICANN, “[competition-pricing-prelim] Chronological Index,” <http://forum.icann.org/lists/competition-pricing-prelim/>.

⁴¹ Andrew Alleman, “ICANN Releases Two ‘Whitewash’ Reports to Defend its Positions on new gTLDs,” *Domain Name Wire*, March 5, 2009, <http://domainnamewire.com/2009/03/05/icann-releases-two-whitewash-reports-to-defend-its-positions-on-new-gtlds/>.

⁴² Michael Froomkin, “Deeply, deeply flawed economic report and analysis,” *ICANN Watch*, March 4, 2009, <http://www.icannwatch.org/article.pl?sid=09/03/05/0248231>.

⁴³ ICANN, “[competition-pricing-prelim] Chronological Index,” <http://forum.icann.org/lists/competition-pricing-prelim/>.

⁴⁴ International Trademark Association, “Creation of New gTLDs and Trademark Protection,” July 8, 2009, http://www.inta.org/index.php?option=com_content&task=view&id=2005&Itemid=153&getcontent=.

⁴⁵ Lamar Smith and Howard Coble, Letter to Rod Beckstrom, September 15, 2009, <http://www.icann.org/correspondence/smith-coble-to-beckstrom-15sep09-en.pdf>.

⁴⁶ Rod Beckstrom, Letter to Lamar Smith and Howard Coble, September 22, 2009, <http://www.domainnamenews.com/wp-content/uploads/2009/09/2009-09-22-letter-from-rod-beckstrom.pdf>.

3.3 Expression of Interest Proposal

The concept of an Expression of Interest (EOI) model, in which prospective applicants could express “interest” in top-level domain strings before filing complete formal applications, was advanced at the October 2009 ICANN meeting in Seoul by various participants, primarily prospective applicants frustrated at the delays and uncertainty surrounding the gTLD program and concerned that the process, which was becoming increasingly expensive, may be put off indefinitely.⁴⁷ An EOI model would serve as a sign of progress, helping to move the process forward. At the meeting, the ICANN Board resolved to direct ICANN staff to “study the potential impact of a call for formal ‘expressions of interest,’” and to submit a draft proposal for Board consideration at the December 2009 Board meeting.⁴⁸ The Board noted that the model “could assist the resolution of the remaining issues and assist ICANN in planning for the coming new gTLD round” and “will likely contribute to a better understanding of: 1) the economic demand for new gTLDs; 2) the number of gTLDs that are likely to be applied for; and, 3) relevant industry data.”⁴⁹

On November 11, 2009, ICANN announced it was considering soliciting expressions of interest in new gTLDs.⁵⁰ ICANN opened a month-long public comment period between November 11 and December 11, 2009 and asked for input on the form an EOI model might take. (Note: in this announcement, ICANN stated that those who wanted to have their comments considered by the ICANN Board during its December meeting should submit comments no later than November 27.)⁵¹

In this round of public comments, supporters of an EOI model included a number of Internet marketing companies, TLD consulting firms, self-identified potential gTLD applicants (including business and civil society organizations), and GoDaddy. They argued it would kick-start the application process and ensure that only serious applicants were involved. Potential gTLD applicant Stephen Ruskowski’s comment is typical of the sentiments expressed by EOI proponents:

I welcome the transparency and approve of any screen that helps ensure all applicants are serious, viable, and well-intentioned. Restricting the round to those who have participated in the formal EOI (with attendant fees, toward the full

⁴⁷ ICANN, “New gTLD Overview: ICANN Meeting, Seoul, Korea,” October 26, 2009, <http://sel.icann.org/meetings/seoul2009/transcript-new-gtlds-program-overview-26oct09-en.txt>. A sample comment from potential applicant Bret Fausett is indicative of this concern: “There are people who are burning money trying to build businesses on this ICANN platform, and it’s very difficult when you don’t know what the target is.”

⁴⁸ ICANN, “Adopted Board Resolutions — Seoul,” October 30, 2009, <http://www.icann.org/en/minutes/resolutions-30oct09-en.htm>.

⁴⁹ ICANN, “Adopted Board Resolutions — Seoul,” October 30, 2009, <http://www.icann.org/en/minutes/resolutions-30oct09-en.htm>.

⁵⁰ ICANN, “Expressions of Interest in new gTLDs: ICANN seeks input and advice,” November 11, 2009, <http://www.icann.org/en/announcements/announcement-11nov09-en.htm>.

⁵¹ ICANN, “Expressions of Interest in New gTLDs,” <http://www.icann.org/en/public-comment/public-comment-200912.htm#eoi-new-gtlds>; ICANN, “[eoi-new-gtlds] Chronological Index,” <http://forum.icann.org/lists/eoi-new-gtlds/>; ICANN, “Expressions of Interest in New gTLDs: Summary of Comments (11 November to 11 December 2009),” January 4, 2010, <http://www.icann.org/en/topics/new-gtlds/summary-analysis-eoi-04jan10-en.pdf>.

application fee) would establish a minimum level of commitment and go a long way toward ensuring the integrity, order, and manageability of the application process. Also, making these EOIs public would promote early conflict resolution and perhaps help some groups and individuals avoid more serious risk as they become aware of better-positioned, more experienced competition.⁵²

On December 18, 2009, ICANN published a draft EOI model, which would require prospective applicants to submit information about themselves and the requested TLD, as well as a \$55,000 deposit, in order to participate in the first round of gTLD applications. Those who did not participate in the EOI would not be eligible to submit a gTLD application until later rounds.⁵³ ICANN opened a second public comment period on this model through January 27, 2010. Arguments against the proposed model clustered around four main points: effectiveness, cost, possible favoritism toward ICANN insiders, and its potential to create a secondary market for TLD slots.⁵⁴

1. **Effectiveness:** In its announcement of the EOI draft proposal, ICANN stated that the goal of the EOI was to gather information about the potential number of applications it would eventually receive. Opponents argued that many serious applicants would stay out of the EOI process to avoid revealing their ideas for a string, preventing unwanted competition (the proposed EOI applied only to the first round of applicants; later rounds were open to anyone). Others believed the EOI model was premature given that draft status of the Applicant Guidebook and that would further delay the application process while pulling attention away from the other, more serious “overarching issues.”

Supporters argued the EOI model would “illuminate” the gTLD landscape, providing a better picture of the prospective applicants, helping avoid conflicting applications and better informing potential applicants of any serious threats to their applications.

2. **Cost:** For many, the \$55,000 EOI fee stood out in sharp contrast to the lack of a similar fee during the EOI phase of first round of gTLD proposals in 2000.⁵⁵ Opponents of the fee worried that non-profits, applicants from the developing world, or those who had been affected by the economic crisis would be effectively priced out of applying. One comment stated that the program “should not be used as a revenue raising tool for ICANN.”

Supporters of the fee, which included many self-identified potential applicants, believed it would effectively prevent non-serious proposals. They also noted that the \$55,000 EOI fee would be applied to the \$185,000 evaluation fee required for any TLD application and that the total cost of entering a new TLD into the root is around \$500,000, making

⁵² Stephen Ruskowski, “EOI,” November 17, 2009, <http://forum.icann.org/lists/eoi-new-gtlds/msg00009.html>.

⁵³ ICANN, “New gTLD Program: Aspects of an Expressions of Interest and Pre-Registration Model,” December 18, 2009, <http://www.icann.org/en/topics/new-gtlds/eoi-model-18dec09-en.pdf>.

⁵⁴ ICANN, “Expressions of Interest (EOI) in New gTLDs: Public Comments Summary and Analysis (11 Nov. to 11 Dec. 2009 and 18 Dec. 2009 to 27 Jan. 2010),” <http://www.icann.org/en/topics/new-gtlds/summary-analysis-eoi-15feb10-en.pdf>.

⁵⁵ In 2000, interested parties were instructed to submit a brief (no more than ten pages) description of their proposal indicating how likely they were to formally apply. No fee was assessed until an applicant officially applied. ICANN, “ICANN Yokohama Meeting Topic: Introduction of New Top-Level Domains,” June 13, 2000, <http://www.icann.org/en/meetings/yokohama/new-tld-topic.htm#V>.

the EOI fee a relatively small part of the process. Those who cannot afford the EOI fee likely cannot afford to apply for or manage a TLD, they argued.

3. **Possible favoritism toward ICANN insiders:** Opponents to the EOI proposal feared that it would give those who tend to be more involved in ICANN an unfair advantage over general Internet users in applying for new gTLDs. Eric Brunner-Williams, the Chief Technology Officer of Core Internet Council of Registrars, specifically voiced this concern, claiming the EOI idea “raises profound anti-competitive and institutional confidence issues from ICANN itself gaming the rules to benefit a group of participants that engage in ICANN’s processes to a greater extent than Internet users generally.”⁵⁶

Proponents, including Richard Tindal (Senior Vice President of domain name registrar eNOM), pointed out that the rules for obtaining a new gTLD were the same no matter who was applying and that a well-executed communications campaign would ensure that all who might want to submit an EOI would be able to do so.⁵⁷

In its analysis of the public comments, ICANN noted that if the Board were to approve the EOI proposal, it would need to organize a widespread information campaign to ensure that all potential applicants were aware of the program.⁵⁸

4. **Potential to create a secondary TLD market:** Some opponents, including Microsoft and Time Warner, expressed concern that applicants would try to “game the system” by first submitting multiple EOIs and then turning around and selling the resulting TLDs to those with real interest in maintaining them and the ability to pay more than the original cost. Those in favor of the EOI system, including Richard Tindal, noted that each EOI costs \$55,000 and provides no guarantee that the desired TLD will actually be obtained, so the likelihood that someone will decide the possible advantages outweigh the financial risks is quite small.⁵⁹

ICANN received nearly 400 public comments during its two open forums on the EOI proposal. In its analysis of these comments, ICANN staff noted that while “many responses expressing opposition actually state the EOI is acceptable if conducted in a certain way,” there was a “general consensus that certain other overarching issues should be addressed prior to the launch of the EOI or gTLD program.”⁶⁰

ICANN held a public discussion on the EOI proposal during the March 2010 meeting in Nairobi,

⁵⁶ ICANN, “Expressions of Interest in New gTLDs: Summary of Comments (11 November to 11 December 2009),” January 4, 2010, <http://www.icann.org/en/topics/new-gtlds/summary-analysis-eoi-04jan10-en.pdf>.

⁵⁷ Richard J Tindal, “Switching on the Light: Expression of Interest for New TLDs,” *Circle ID*, February 25, 2010, http://www.circleid.com/posts/switching_on_the_light_expression_of_interest_tlds/.

⁵⁸ ICANN, “Expressions of Interest (EOI) in New gTLDs: Public Comments Summary and Analysis (11 Nov. to 11 Dec. 2009 and 18 Dec. 2009 to 27 Jan. 2010),” <http://www.icann.org/en/topics/new-gtlds/summary-analysis-eoi-15feb10-en.pdf>.

⁵⁹ Richard J Tindal, “Switching on the Light: Expression of Interest for New TLDs,” *Circle ID*, February 25, 2010, http://www.circleid.com/posts/switching_on_the_light_expression_of_interest_tlds/.

⁶⁰ ICANN, “Expressions of Interest (EOI) in New gTLDs: Public Comments Summary and Analysis (11 Nov. to 11 Dec. 2009 and 18 Dec. 2009 to 27 Jan. 2010),” <http://www.icann.org/en/topics/new-gtlds/summary-analysis-eoi-15feb10-en.pdf>.

during which there was very little consensus.⁶¹ The GAC also held a discussion of the EOI and submitted a Communiqué to the Board in which it “question[ed] the benefits of pursuing further a separate EOI process, which could distract attention and resources from finalizing the new gTLD program.”⁶² At that meeting, the ICANN Board voted against implementing an EOI model, claiming it would cause unnecessary confusion and delay and that it would take resources away from other critical issues.⁶³ ICANN CEO and president Rod Beckstrom said that the EOI proposal, if enacted, would have “added another step, another process, another set of community discussions and debate” to the gTLD process.⁶⁴ Some interviewees who had submitted public comments expressed concerns that this explanation for the Board’s decision was not adequate, given the fact that many of the submissions did in fact express support for the EOI.⁶⁵

3.4 Trademark Issues and the Implementation Recommendation Team

Of the four “overarching issues” identified by ICANN staff via the comments on the first version of the DAG, issues related to trademark protection have elicited the most public attention.

For many trademark holders, the introduction of new gTLDs raises concerns about trademark protection. ICANN is taking these concerns seriously; of the twenty principles laid out in the GNSO recommendations, the need to protect existing trademarks is listed third, above the need to prevent technical instability within the DNS and the need to comply with international human rights norms.⁶⁶

The GNSO recommendations also include the need to prevent TLDs that are “confusingly similar” to existing top-level domains or Reserved Names; this recommendation is listed second. While this recommendation does not specifically reference trademarks, the accompanying notes largely concern trademark law. In a comment on the recommendation, Avri Doria, then Chair of the GNSO Council, expressed her concern with the language, noting:

*By using terms that rely on the legal language of trademark law, I believe we have created an implicit redundancy between recommendations 2 and 3. I.e., I believe both 2 and 3 can be used to protect trademarks and other intellectual property rights, and while 3 has specific limitations, 2 remains open to full and varied interpretation.*⁶⁷

⁶¹ ICANN, “New gTLD Update and EOI Panel Discussion,” March 8, 2010, <http://nbo.icann.org/node/8877>.

⁶² GAC, “GAC Communiqué—Nairobi,” March 11, 2010, http://gac.icann.org/system/files/Nairobi_Communique.pdf.

⁶³ ICANN, “Adopted Board Resolutions — Nairobi,” March 12, 2010, <http://www.icann.org/en/minutes/resolutions-12mar10-en.htm>; Elisa Cooper, “EI, EI — NO!,” *Circle ID*, March 12, 2010, http://www.circleid.com/posts/20100312_icann_expression_of_interest_ei_ei_no/.

⁶⁴ Ascio, “Highlights from the ICANN Meeting 7-12 March—Nairobi, Kenya,” March 25, 2010, <http://www.ascio.com/NewsContent.aspx?id=296>.

⁶⁵ Interviews, September 2010.

⁶⁶ GNSO, “Final Report - Introduction of New Generic Top-Level Domains,” August 8, 2007, <http://gnsso.icann.org/issues/new-gtlds/pdp-dec05-fr-part-a-08aug07.htm>.

⁶⁷ GNSO, “Final Report - Introduction of New Generic Top-Level Domains,” footnote 39, August 8, 2007, http://gnsso.icann.org/issues/new-gtlds/pdp-dec05-fr-part-a-08aug07.htm#_ftn39.

Within trademark law, the concept of “confusingly similar” holds a different legal standard than the concept of “likelihood of confusion.” Two names—Acme Hardware and Acme Realty—may be “confusingly similar,” but, as they are used for dissimilar goods and services, are unlikely to cause confusion and therefore do not infringe on one another’s trademark. American University law professor Christine Farley explains that in domain name policy, where only the requested string is being considered, “confusingly similar” is the only standard that can be applied because domain names lack the real-world context necessary to determine “likelihood of confusion.” The GNSO recommendation “equates domain names with trademarks as legally protectable properties,” she writes, pointing out that under the proposed standards American University, which currently owns american.edu, would theoretically be able to prevent anyone else from registering .american. Furthermore, she notes, trademarks are largely regionally and market-based, whereas domain names are global; a “one-size-fits-all approach would leave consumers confused in one place, while unjustifiably denying speech rights in another.”⁶⁸

On the other side of the debate are trademark holders, who fear that the introduction of new gTLDs will worsen existing problems with trademark infringement and cybersquatting. They fear they will be required to “defensively register” their trademarks as gTLDs—a costly process at \$185,000 per gTLD—as well as purchase second level domains in each new TLD to protect their brands. Monitoring and enforcing their trademarks across a broad new swath of domain registries will be overwhelming, they argue.⁶⁹ (Not all agree with these assertions. Using ten years of data from cases decided according to the Uniform Dispute Resolution Policy, Fred Kreuger and Antony Van Couvering of Minds + Machines estimate that the total annual cost to trademark holders resulting from new gTLDs may be as little as \$0.10 per trademark worldwide.⁷⁰)

At the March 2009 ICANN meeting in Mexico City, the Board resolved to request that the GNSO’s Intellectual Property Constituency form an Implementation Recommendation Team (IRT) to “develop and propose solutions to the overarching issue of trademark protection in connection with the introduction of new gTLDs.”⁷¹ This resolution was in response to a proposal by “members of the community with knowledge and expertise in this area.”⁷² These community members were identified in interviews as members of the GNSO’s Intellectual Property Constituency (IPC).⁷³ The IRT was organized by the IPC in consultation with the ICANN staff. According to the Board resolution, the team should be “comprised of an internationally diverse group of persons with knowledge, expertise, and experience in the fields of trademark, consumer

⁶⁸ Christine Haight Farley, “Convergence and Incongruence: Trademark Law and ICANN’s Introduction of New Generic Top-Level Domains,” Washington College of Law Research Paper No. 2009-22, <http://ssrn.com/abstract=1400304>.

⁶⁹ Joshua S. Jarvis, “New gTLDs Still On Track Despite Trademark Concerns,” *Trademark and Copyright Law Blog*, April 2, 2010, <http://www.trademarkandcopyrightlawblog.com/2010/04/articles/domain-names/new-gtlds-still-on-track-despite-trademark-concerns/>.

⁷⁰ Fred Kreuger and Antony Van Couvering, “A Quantitative Analysis of Trademark Infringement and Cost to Trademark Holders in New gTLDs,” Minds + Machines Working Paper 2010-1, February 10, 2010, <http://www.mindsandmachines.com/wp-content/uploads/M+M-Quantitative-Analysis-of-Cost-of-New-TLDs-to-Trademarks.pdf>.

⁷¹ ICANN, “Adopted Board Resolutions — Mexico,” March 6, 2009, <http://www.icann.org/en/minutes/resolutions-06mar09.htm>.

⁷² *Ibid.*

⁷³ Interviews, September 2010.

protection, or competition law, and the interplay of trademarks and the domain name system.” The resolution also directed the IRT to “solicit input from the interested constituencies prior to its first session to ensure broad community input at the outset of its work.”⁷⁴

The IRT was criticized by the domain name industry and the ALAC for containing only trademark industry representatives and excluding consumers, Internet users and domain name registrants. In a statement regarding the IRT’s final report, ALAC said, “We are aware of a number of qualified individuals who expressed interest in participating in the IRT but were summarily refused without reason.”⁷⁵ These sentiments were echoed in several interviews. Interviewees also raised questions about the process behind the creation of the IRT, particularly focusing on whether the creation of a team of experts selected from a subset of the GNSO constituency was consistent with ICANN’s commitment to a bottom-up, multi-stakeholder approach to policy making.⁷⁶

The IRT met via teleconference and held two in-person sessions (one in Washington, D.C. and one in San Francisco, both supported by ICANN staff) between March 25, 2009 and the submission of its final report to the ICANN Board on May 6, 2009. Its draft report, published on April 24, 2009, was open for public comment from April 24–May 24, 2009. The final report was made available for comment from May 29–June 29, 2009; this period was later extended to July 6, 2009. Some interviewees raised concerns over ICANN’s response to the IRT final report. They noted that though the ICANN Board had commissioned a report from the IRT “for consideration by the ICANN community at the [June 2009] Sydney meeting,”⁷⁷ the IRT was not given a chance to meet with the Board directly at this meeting.⁷⁸ (The IRT recommendations were, however, discussed at a consultation session on trademark protection and malicious behavior.⁷⁹)

The IRT’s May 2009 final report proposed the following mechanisms for trademark protection:

- IP Clearinghouse, Globally Protected Marks List and associated Rights Protection Mechanisms, and standardized pre-launch rights protection mechanisms;
- Uniform Rapid Suspension System;
- Post delegation dispute resolution mechanisms (PDDRP);
- Whois requirements for new TLDs; and
- Use of algorithm in string confusion review during initial evaluation.⁸⁰

⁷⁴ Ibid.

⁷⁵ ALAC, “Statement of the Committee to the Public Consultation on the Implementation Recommendation Team (IRT) Final Report of 29th May 2009,” July 7, 2009, <https://www.atlarge.icann.org/files/atlarge/correspondence-07jul09-en.pdf>.

⁷⁶ Interviews, September 2010.

⁷⁷ ICANN, “Adopted Board Resolutions — Mexico,” March 6, 2009, <http://www.icann.org/en/minutes/resolutions-06mar09.htm>.

⁷⁸ Interviews, September 2010.

⁷⁹ ICANN, “New gTLD Program—Consultation Session on Trademark Protection and Malicious Behavior,” June 24, 2009, <http://syd.icann.org/node/3788>.

⁸⁰ ICANN, “Final Report on Trademark Protection in New gTLDs,” May 29, 2009, <http://www.icann.org/en/topics/new-gtlds/irt-final-report-trademark-protection-29may09-en.pdf>.

These recommendations have raised multiple objections, as described in the ICANN staff analysis of public comments on the IRT final report.⁸¹ Among them:

1. The International Trademark Association generally praised the IRT recommendations but expressed concerns that they “may not be adequate to address the potential problems associated with an unlimited expansion of NTLDs [new gTLDs].”⁸²
2. Some have raised the concern that the IP Clearinghouse, which would act as a repository of trademark rights (including family names, trade names, unregistered marks and globally protected marks), may “represent a step towards a wholly new global registered trademark system,” the creation of which “is outside ICANN’s scope and authority.” Comments submitted by the NCUC and ALAC express concerns that the creation of this clearinghouse “could effectively derail ICANN.”
3. A Globally Protected Marks List (GPML) would prevent the registration of gTLDs and second level domain names matching any of the marks it contains. The list would contain only those marks registered in countries in each of the five global regions defined by ICANN. Opponents argue that registering a trademark in each region in order to include it in the GPML would constitute a major burden on trademark holders while providing relatively little protection. The current version of the DAG makes no mention of a GPML.
4. A comment submitted by George Kirikos calls the Uniform Rapid Suspension System (URS) an “extremist view of trademark rights favoring IP interests in comparison with the UDRP” [ICANN’s existing Uniform Domain-Name Dispute-Resolution Policy] that “goes beyond what is protected by law and due process.” Opponents to the URS fear it could become “an easy, cheap tool for Reverse Domain Name Hijacking.”
5. Privacy advocates worry that the Whois requirement may pose a threat to free speech. In a statement delivered at the Sydney ICANN meeting in June 2009, the At-Large Community, the At-Large Advisory Committee and the Non-Commercial Users Constituency noted that the Whois requirement did not take into account international privacy standards or national laws protecting privacy.⁸³

The report was criticized as heavily weighted in favor of existing IP interests and overstepping both the bounds of existing copyright and trademark law and ICANN’s own mandate by asking that ICANN take responsibility for policing instances of trademarked terms in second and third level domains. In their joint statement in June 2009, the At-Large Advisory Committee and Non-Commercial Users Constituency claimed that “in the case of the IRT Report, we had neither

⁸¹ ICANN, “Summary Analysis of IRT Final Report Comments (Post-delegation Process and other Comments),” October 2009, <https://st.icann.org/data/workspaces/new-gtld-overarching-issues/attachments/trademark-protection:20091006224010-0-1875/original/summary-analysis-irt-final-report-04oct09-en.pdf>.

⁸² Anthony J. Biller and Jennifer Bisk, “Who is Going to Own DotAmazon? The Pending Domain Name Land Grab,” *Landslide 2* (2009).

⁸³ ICANN, “Joint Statement from ALAC/At-Large and NCUC made at Sydney Meeting re IRT Report,” June 25, 2009, http://st.icann.org/gnso-liaison/index.cgi?at_large_irt_process_working_group.

transparency nor openness” and announced their formal opposition to the GPML, Uniform Rapid Suspension System and thick Whois proposals.⁸⁴

Following the IRT report, the Board sent a letter on October 12, 2009 to the GNSO Council for rapid review, saying it would implement several IRT recommendations unless the GNSO Council voted otherwise.⁸⁵ On October 28, 2009, the GNSO called for participants from all stakeholder groups to form a broad “Special Trademark Issues” working group (STI). The STI worked to produce a consensus representing tradeoffs and compromises among positions. Its December 11, 2009 report⁸⁶ was approved by the GNSO Council, which “resolve[d] that the STI proposal to create a Trademark Clearinghouse and a Uniform Rapid Suspension procedure as described in the STI Report are more effective and implementable solutions than the corresponding staff implementation models that were described in memoranda accompanying the Draft Applicant Guidebook Version 3.”⁸⁷ The GNSO posted the STI report for public comment between its December 2009 meeting and January 26, 2010.

ICANN revised the IP clearinghouse and Uniform Rapid Suspension System proposals in the DAG to reflect the STI recommendations and posted these new proposals for public comment on February 15, 2010. At the March 2010 meeting, the Board voted to analyze public comments on the new proposals and to create guidelines accordingly to add to the Draft Applicant Guidebook for new gTLD applicants. The Board also resolved to analyze public comment on the PDDRP and to “synthesize those comments, as appropriate,” in the DAG.⁸⁸

In the opinion of some interviewees, the STI working group was an example of the bottom-up, multi-stakeholder model of policy development to which ICANN is committed. Some expressed the view that ICANN should have formed the STI working group in response to initial concerns over trademark protection, rather than delegating these issues to the IRT. This view was generally tied to the belief that, although the IRT was officially tasked with developing recommendations relating to the implementation of the trademark protection policies developed by the GNSO, in reality, its work also included policy development. As the GNSO is the body responsible for “developing and recommending to the ICANN Board substantive policies relating to generic top-level domains,”⁸⁹ some interviewees felt that trademark issues should have been referred to the GNSO once substantial concerns had been raised by the community.⁹⁰ Other

⁸⁴ ICANN, “Joint Statement from ALAC/At-Large and NCUC made at Sydney Meeting re IRT Report,” June 25, 2009, http://st.icann.org/gnsso-liaison/index.cgi?at_large_irt_process_working_group.

⁸⁵ GNSO, “Letter from Rod Beckstrom & Peter Dengate Thrush to GNSO Council,” October 12, 2009, <http://gnsso.icann.org/correspondence/beckstrom-to-gnsso-council-12oct09-en.pdf>.

⁸⁶ GNSO, “Special Trademark Issues Review Team Recommendations,” Special Trademark Issues Work Team, December 11, 2009, <http://gnsso.icann.org/issues/sti/sti-wt-recommendations-11dec09-en.pdf>.

⁸⁷ GNSO, “GNSO Council Minutes,” December 17, 2009, <http://gnsso.icann.org/meetings/minutes-council-17dec09-en.htm>.

⁸⁸ ICANN, “Adopted Board Resolutions — Nairobi,” March 12, 2010, <http://www.icann.org/en/minutes/resolutions-12mar10-en.htm>.

⁸⁹ ICANN, “Bylaws for Internet Corporation for Assigned Names and Numbers”, amended June 25, 2010, <http://www.icann.org/en/general/bylaws.htm>.

⁹⁰ Interviews, September 2010.

interviewees felt ICANN was right to consult experts for advice on implementing the GNSO's policy recommendation that "strings must not infringe the existing legal rights of others."⁹¹

The current version of the DAG states that requested gTLDs will be reviewed for similarity with existing TLDs, reserved names (a list of 34 strings such as "example," "test" and "tld"), applied-for gTLDs and strings requested as Internationalized Domain Name country code TLDs. Second level domains will not be included in the string similarity review process. Trademark holders may file objections to gTLD applications in accordance with the draft WIPO Rules for New gTLD Dispute Resolution.

3.5 The Role of the Governmental Advisory Committee

In March 2007, the GAC submitted a list of principles relating to new gTLDs to the ICANN Board.⁹² The preamble to this list emphasizes the "sovereign right of States" over "international Internet-related public policy issues" as laid out in the 2003 World Summit on the Information Society Declaration. It also points to ICANN's own Bylaws, which commit the organization to "seeking and supporting broad, informed participation reflecting the functional, geographic and cultural diversity of the Internet at all levels of policy development and decision making" and "recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations." Following the preamble is a list of principles that the GAC states "need to be respected."⁹³

The final section of the document states that, in line with ICANN's Bylaws, "ICANN should consult the GAC, as appropriate, regarding any questions pertaining to the implementation of these principles" and that "if any individual GAC members or other governments express formal concerns about any issues related to new gTLDs, the ICANN Board should fully consider those concerns and clearly explain how it will address them."⁹⁴

Throughout the development of the new gTLD program, the GAC has submitted inputs to the ICANN Board via a number of different channels, including the March 2007 GAC principles document, Communiqués published after each of its meetings, and direct letters.

The interviews highlighted tensions among various stakeholders as to the specific role of the GAC in the development of the new gTLD program. Specific issues included the timeliness of GAC advice to the Board, the lack of staff and Board responsiveness to GAC advice, and the role of the GAC in ICANN's policy development process.⁹⁵

- **Timeliness of GAC advice:** Some interviewees expressed concerns that the GAC was delaying the progress of the new gTLD program by providing its advice too late in the process; for example, by raising concerns about the morality and public order standard

⁹¹ Interviews, September 2010; GNSO, "Final Report - Introduction of New Generic Top-Level Domains," August 8, 2007, <http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-part-a-08aug07.htm>.

⁹² GAC, "GAC Principles Regarding new gTLDs," March 28, 2007, http://gac.icann.org/system/files/gTLD_principles_0.pdf.

⁹³ GAC, "GAC Principles Regarding new gTLDs," March 28, 2007, http://gac.icann.org/system/files/gTLD_principles_0.pdf.

⁹⁴ Ibid.

⁹⁵ Interviews, September 2010.

(see section 3.1) or by communicating its views on one version of the DAG as the subsequent version was published. Some questioned why, when individual GAC members attended working group meetings, the GAC as a whole appeared uninformed about the issues discussed in these meetings, responding to specific issues months or in some cases years after they were first introduced. Other interviewees noted that the GAC typically attempts to develop consensus before providing advice to the Board and that this process involves time-consuming consultation with national governments. Interviewees stated that this process is often complicated by the fact that the GAC receives lengthy documents to discuss just a few weeks prior to its meetings, making it difficult to read through these documents and discuss them with national governments in time to come to a consensus.

- **Staff and Board responsiveness to GAC advice:** Some interviewees expressed concerns that, because the Board primarily receives its information from briefing materials prepared by the staff and because these briefing materials are not made public, it is unclear whether the Board is adequately informed of GAC advice. Some interviewees expressed concerns that GAC advice has been largely ignored by the Board. This would be at odds with ICANN's Bylaws, which require the Board to take GAC advice into account in the "formulation and adoption of policies" and to explain any decision it makes that contradicts GAC advice.
- **GAC role in policy development:** As noted above, some interviewees expressed concerns that GAC advice has not been considered in a timely manner during the development of the new gTLD program. One example is the GAC's position on the use of geographic names as top-level domains: seven official Communiqués and two letters from the GAC between October 2007 and August 2009 expressed the GAC's opposition to the unlimited use of geographic names without government approval and requested more stringent provisions on this issue in the DAG. Other interviewees expressed concerns that the GAC is overstepping its bounds in the advice it has contributed to the gTLD process by attempting to make or influence policy independently while ignoring the policy recommendations of the GNSO. Interviewees also had differing views on the meaning of the GAC's advisory role: some felt the GAC is rightfully given more weight than other advisory committees, while others felt that the GAC should play a weaker role. Other interviewees felt that GAC advice is less helpful than it could be, expressing concerns that the GAC often states certain principles (for example, their views on the use of geographic names as top-level domains) without proposing solutions for how to carry out these principles in practice.

3.5.1 Geographic Names

The GAC principles on new gTLDs state that ICANN should "avoid country, territory or place names, and country, territory or regional language or people descriptions, unless in agreement with the relevant governments or public authorities" and that applicant registries should pledge

to block “at no cost and upon demand of governments...names with national or geographic significance at the second level of any new gTLD.”⁹⁶

According to Internet governance scholar and Non-Commercial Users Constituency co-founder Milton Mueller, the GAC has long been concerned with the use of the names of countries, regions, languages or peoples as domain names. He writes that as early as 1998, the GAC “demanded...that ICANN abstain” from assigning these names.⁹⁷ Mueller states that after the first TLD expansion in 2000, the director-general of the European Commission reportedly wrote to ICANN’s President and asked that governments have the first shot at registering ISO country codes in the new TLDs (example: uk.biz and gbr.biz). In 2001, the GAC requested—and ICANN approved this request—that all country names be reserved in the .info TLD for government use. Mueller points out that the Domain Name Supporting Organization (the precursor to the GNSO) was not involved in this decision, despite being responsible for suggesting policy related to TLDs.

In its October 2007 Communiqué, the GAC expressed concerns that the GNSO recommendations for new gTLDs did not “properly take into account” the GAC principles regarding the use of country names in new gTLDs.⁹⁸ The GAC expressed this concern again in its June 2008,⁹⁹ November 2008,¹⁰⁰ March 2009,¹⁰¹ June 2009,¹⁰² October 2009¹⁰³ and March 2010¹⁰⁴ Communiqués, as well as in letters on April 24¹⁰⁵ and August 18, 2009.¹⁰⁶

The second version of the DAG, published on February 19, 2009, required “evidence of support, or non-objection from the relevant government of public authority” for applicants for geographic name-based gTLDs.¹⁰⁷ In communications to the Board after the publication of this draft of the DAG, the GAC acknowledged that it was an improvement on the first version but that it did not yet fully represent the GAC’s views.¹⁰⁸ In response, representatives of the Internet Commerce

⁹⁶ GAC, “GAC Principles Regarding new gTLDs,” March 28, 2007, http://gac.icann.org/system/files/gTLD_principles_0.pdf.

⁹⁷ Milton Mueller, “Governments and Country Names: ICANN’s Transformation into an Intergovernmental Regime,” <http://istweb.syr.edu/~mueller/gacnames.pdf>.

⁹⁸ GAC, “GAC Communiqué—Los Angeles,” October 31, 2007, http://gac.icann.org/system/files/GAC_30_Los_Angeles_Communique.pdf.

⁹⁹ GAC, “GAC Communiqué—Paris,” June 26, 2008, http://gac.icann.org/system/files/GAC_32_Paris_Communique.pdf.

¹⁰⁰ GAC, “GAC Communiqué—Cairo,” November 5, 2008, http://gac.icann.org/system/files/GAC_33_Cairo_Communique.pdf.

¹⁰¹ GAC, “GAC Communiqué—Mexico City,” March 5, 2009, http://gac.icann.org/system/files/GAC_34_Mexico_City_Communique_English.pdf.

¹⁰² GAC, “GAC Communiqué—Sydney,” June 24, 2009, <http://gac.icann.org/system/files/Sydney\%20Communique.pdf>.

¹⁰³ GAC, “GAC Communiqué—Seoul,” October 8, 2009, http://gac.icann.org/system/files/Seoul_communique.pdf.

¹⁰⁴ GAC, “GAC Communiqué—Nairobi,” March 10, 2010, http://gac.icann.org/system/files/Nairobi_Communique.pdf.

¹⁰⁵ Letter from Janis Karklins to Paul Twomey, April 24, 2009, <http://www.icann.org/correspondence/karklins-to-twomey-24apr09.pdf>.

¹⁰⁶ Letter from Janis Karklins, the Chairman of the Governmental Advisory Committee, Ambassador of Latvia to France to Peter Dengate Thrush, the Chairman of the Board, August 18, 2009, <http://www.icann.org/correspondence/karklins-to-dengate-thrush-18aug09-en.pdf>.

¹⁰⁷ ICANN, “Draft Applicant Guidebook, version 2,” February 19, 2009, <http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-18feb09-en.pdf>.

¹⁰⁸ Letter from Janis Karklins, the Chairman of the Governmental Advisory Committee, Ambassador of Latvia to France to Peter Dengate Thrush, the Chairman of the Board, August 18, 2009, <http://www.icann.org/correspondence/karklins-to-dengate-thrush-18aug09-en.pdf>.

Association demanded to know why ICANN had chosen the recommendations of the GAC over those of the GNSO, in which geographic names were given less protection.¹⁰⁹

Some interviewees supported government's rights to object to geographic name TLDs, deferring to government sovereignty. Some supported a limit exercise of these rights, for example with respect to city TLDs, where government sovereignty is clearly defined, but not with respect to regional or other TLDs, where sovereignty is less clear. Others expressed concerns that governmental approval will be too challenging for some TLD applicants to obtain (particularly in the developing world), or that giving governments the right to refuse to permit geographic name TLDs goes beyond governments' current rights to object to the use of geographic names in other areas, such as commercial ventures.¹¹⁰

3.5.2 Expression of Interest Proposal

The ICANN Board introduced the concept of an EOI after the GAC's October 2009 meeting; after receiving a draft EOI proposal from ICANN staff at its December 2009 meeting, the Board resolved to direct the staff to prepare a final model for Board approval at its February 2010 meeting.¹¹¹ This vote would have taken place before the next in-person GAC meeting. A public comment submitted by GAC member Bertrand de la Chapelle on behalf of the French government stated that France hoped that "no premature decision will be taken by the Board in February."¹¹²

Michael Palage has noted that Article III, Section 6 of ICANN's Bylaws requires ICANN to consult the GAC "in those cases where the policy action affects public policy concerns." Palage points to the potential creation of a secondary market for TLD slots and the potential EOI fee as examples of public policy issues raised in the EOI. In January 2010, Palage wrote that if the ICANN Board were to vote on the EOI proposal during its February 2010 meeting, as it had originally proposed, it would be violating these Bylaws. The Board ultimately postponed its decision on the EOI until its March 2010 meeting.

3.5.3 Overarching Issues

The GAC has also expressed concerns related to the four "overarching issues" identified by ICANN staff in February 2009. In an August 2009 letter, the GAC stressed the importance of a "controlled and prudent expansion" and a "more measured rollout," worried that the potential benefits to consumers might not outweigh the potential harms of such an expansion, and

¹⁰⁹ ICANN, "Public Comment Analysis Report: Draft Applicant Guidebook, version 2," May 31, 2009, <http://www.icann.org/en/topics/new-gtlds/agv2-analysis-public-comments-31may09-en.pdf>.

¹¹⁰ Interviews, September 2010.

¹¹¹ ICANN, "Preliminary Report of Special Board Meeting," December 9, 2009, <http://www.icann.org/en/minutes/prelim-report-09dec09-en.htm>.

¹¹² Bertrand de la Chapelle, "From Black and White to Shades of Blue – Comments by France," January 28, 2010, <http://forum.icann.org/lists/draft-eoi-model/msg00256.html>.

expressed concerns that new gTLDs might confuse consumers and lead to “a multitude of monopolies, rather than increasing competition.”¹¹³

3.6 The Morality and Public Order Standard

The March 2007 GAC principles state that new gTLDs should respect national, cultural, geographic and religious sensitivities.¹¹⁴ The current approach to handling governmental objections to nationally, culturally and religiously sensitive gTLD applications is based on the Paris Convention for the Protection of Industrial Property, a 19th century trademark treaty that allowed national governments to refuse to recognize a trademark on the grounds that it conflicted with their local definition of “morality and public order.”¹¹⁵ The morality and public order standard first appeared in the GNSO final report on new gTLDs; the report’s sixth recommendation stated that “strings must not be contrary to generally accepted legal norms relating to morality and public order that are recognized under international principles of law.” In its notes on this recommendation, the GNSO Committee on New TLDs explained that it had “examined the approach taken in a wide variety of jurisdictions to issues of morality and public order” and had “sought to be consistent with, for example, Article 3 (1) (f) of the 1988 European Union Trade Mark Directive 89/104/EEC and within Article 7 (1) (f) of the 1993 European Union Trade Mark Regulation 40/94.” The Committee also stated that the reference to morality and public order “remains relevant to domain names even though, when it was drafted, domain names were completely unheard of.”¹¹⁶

However, the standard has met with objections from both civil society and the GAC. Opponents point out that there are no globally applicable standards of “morality and public order” and argue that the policy could be used to violate free expression rights.¹¹⁷ Former GNSO Council Chair Avri Doria submitted a formal comment on the GNSO recommendations that typifies these objections:

By including morality in the list of allowable exclusions we have made the possible exclusion list indefinitely large and have subjected the process to the consideration of all possible religious and ethical systems. ICANN or the panel of reviewers will also have to decide between different sets of moral principles, e.g, a morality that holds that people should be free to express themselves in all forms of media and those who believe that people should be free from exposure to any expression that is prohibited by their faith or moral principles. This recommendation will also subject the process to the fashion and occasional demagoguery of political correctness. I do not understand how ICANN or any expert panel will be able to judge that something should be excluded based on reasons of morality

¹¹³ Janis Karklins, Chairman of the Governmental Advisory Committee, Letter to Peter Dengate Thrush, Chairman of the Board, ICANN, August 18, 2009, <http://www.icann.org/correspondence/karklins-to-dengate-thrush-18aug09-en.pdf>.

¹¹⁴ GAC, “GAC Principles Regarding new gTLDs,” March 28, 2007, http://gac.icann.org/system/files/gTLD_principles_0.pdf.

¹¹⁵ Paris Convention for the Protection of Industrial Property, March 20, 1883 (amended September 28, 1979), http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html.

¹¹⁶ GNSO, “Final Report—Introduction of New Generic Top-Level Domains,” August 8, 2007, <http://gns0.icann.org/issues/new-gtlds/pdp-dec05-fr-part-a-08aug07.htm>.

¹¹⁷ Milton Mueller, “ICANN and GAC discuss censorship,” *Internet Governance Project*, June 23, 2010, http://blog.internetgovernance.org/blog/_archives/2010/6/23/4560694.html.

*without defining, at least de-facto, an ICANN definition of morality? And while I am not a strict constructionist and sometimes allow for the broader interpretation of ICANN's mission, I do not believe it includes the definition of a system of morality.*¹¹⁸

In October 2008, ICANN published an explanatory memorandum on the morality and public standard. The document stated that ICANN would likely restrict morality and public order objections to three areas: incitement to violent lawless action; incitement to or promotion of discrimination based upon race, color, gender, ethnicity, religion or national origin; and incitement to or promotion of child pornography or other sexual abuse of children.¹¹⁹ A follow-up document released in May 2009 added “a determination that an applied-for gTLD string would be contrary to equally generally accepted identified legal norms relating to morality and public order that are recognized under general principles of international law” to the acceptable list of morality and public order objections.¹²⁰ This definition is currently part of the DAG, though ICANN has not yet responded to calls from the NCUC and others that it disclose the legal analysis by which it concludes that there are such “generally accepted legal norms.”

As early as October 2009, the GAC expressed concerns about the morality and public order standard as the method of handling governmental objections to proposed TLDs.¹²¹ In its March 2010 Communiqué to the ICANN Board, the GAC stated:

*The GAC questions the appropriateness of the phrase “morality and public order” and is unclear how the proposed mechanism would work in practice. The GAC believes this item should not be listed on the “closed items” list with respect to the new gTLD process and requests a more detailed briefing from the ICANN staff on the anticipated practical implementation of the approach.*¹²²

In interviews, some questioned why the GAC had not expressed objections to the morality and public order standard when it was first proposed in the October 2007 GNSO recommendations.¹²³

3.7 Vertical Integration

A further question facing ICANN in conjunction with the introduction of new gTLDs is whether registries and registrars should be forced to remain separate. Current ICANN agreements (since 2001) with gTLD registries prohibit registries from owning more than 15 percent of a registrar. This policy was established in response to the previous monopoly position of Network Solutions, which provided both registry and registrar functions for .com, .net and .org. In 1999, Network

¹¹⁸ GNSO, “Final Report—Introduction of New Generic Top-Level Domains,” August 8, 2007, <http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-part-a-08aug07.htm>.

¹¹⁹ ICANN, “New gTLD Program Explanatory Memorandum: Morality and Public Order Objection Considerations in New gTLDs,” October 29, 2008, <http://www.icann.org/en/topics/new-gtlds/morality-public-order-draft-29oct08-en.pdf>.

¹²⁰ ICANN, “New gTLD Program Explanatory Memorandum: Standards for Morality and Public Order Research,” May 30, 2009, <http://www.icann.org/en/topics/new-gtlds/morality-public-order-30may09-en.pdf>.

¹²¹ GAC, “GAC Communiqué—Seoul,” October 8, 2009, http://gac.icann.org/system/files/Seoul_communique.pdf.

¹²² “GAC Communiqué—Nairobi,” March 10, 2010, http://gac.icann.org/system/files/Nairobi_Communique.pdf.

¹²³ Interviews, September 2010.

Solutions agreed to separate its registry and registrar functions.¹²⁴ In 2003, VeriSign (which had acquired Network Solutions in 2000) sold Network Solutions, which continued to operate solely as a registrar. VeriSign retained the registry business; it also retained a 15 percent stake in Network Solutions.¹²⁵

Some stakeholders recommend a clear policy preventing registry operators from acting as registrar for their own gTLDs. Opponents of vertical integration argue that ICANN's current policy "eliminated the conflict of interest inherent in the system and resulted in robust, competitive markets for both registrars and registries, significantly lower consumer prices, and dramatic DNS growth—without jeopardizing stability or security."¹²⁶ They argue that allowing registries to act as registrars gives them the opportunity to misuse data regarding consumer demand. In public comments on the issue, the Public Interest Registry has referenced a study by Jonathan A. K. Cave that states that cross-ownership between registries and registrars may give those registrars an unfair advantage in negotiating with other registries. Cave also argues that commercial registries that own registrars may have an unfair advantage over non-commercial registries that do not.¹²⁷

Supporters of vertical integration argue the forced separation between registries and registrars is outdated.¹²⁸ Vertical integration, they believe, could in fact lower prices and increase quality of service by allowing new registries to gain a foothold in the market and by fostering innovation in product development.¹²⁹

ICANN has commissioned two independent studies on vertical integration. The first, a report by Charles River Associates International (CRAI), was made available for public comment on October 24, 2008.¹³⁰ It contained two primary recommendations: 1) that "single organization" TLDs be permitted to operate both the registry and the registrar selling domains within that TLD; and 2) that a registry may own a registrar, provided that the registrar does not sell domains within the TLDs operated by the registry. ICANN received 32 comments on this report between October 24 and December 23, 2008.¹³¹

¹²⁴ ICANN, "Approved Agreements among ICANN, the US Department of Commerce, and Network Solutions, Inc.," November 10, 1999, <http://www.icann.org/en/nsi/nsi-agreements.htm>.

¹²⁵ Matt Hines, "VeriSign sells off domain registrar," *CNet News*, October 16, 2003, http://news.cnet.com/VeriSign-sells-off-domain-registrar/2100-1025_3-5092316.html.

¹²⁶ Supporting True Intra-Registry Separation to Help Prevent Insider Trading, "Open Letter to ICANN in favor of 'True Registry-Registrar Separation,'" <http://intratldregistryregistrar-separation.org/>.

¹²⁷ ICANN, "New gTLD Program Explanatory Memorandum: Registry-Registrar Separation," February 18, 2009, <http://www.icann.org/en/topics/new-gtlds/registry-registrar-separation-18feb09-en.pdf>.

¹²⁸ Tony Kirsch, "Registry/Registrar Separation: Clarifying the Mess!," *AusRegistry*, February 17, 2010, <http://www.ausregistry.com/blog/?p=300>.

¹²⁹ Steven C. Salop and Joshua D. Wright, "Registry-Registrar Separation: Vertical Integration Options," January 28, 2010, <http://www.icann.org/en/topics/new-gtlds/registry-registrar-separation-vertical-integration-options-salop-wright-28jan10-en.pdf>.

¹³⁰ ICANN, "Public Comment: CRAI Report on gTLD Registries and Registrars," October 24, 2008, <http://www.icann.org/en/announcements/announcement-24oct08-en.htm>.

¹³¹ ICANN, "CRA Report: Revisiting Vertical Separation of Registries and Registrars — Summary & Analysis of Comments," January 12, 2009, <http://forum.icann.org/lists/crai-report/pdfMQnSWwlenD.pdf>.

ICANN's February 2009 explanatory memorandum on vertical integration contained an ICANN staff summary of public comments on the CRAI report. Some comments were in favor of continued prohibitions against cross-ownership, others supported a limited cross-ownership model, and others were in favor of complete vertical integration. The staff summary of comments described several possible options:¹³²

1. **Cross-Ownership—Finite Threshold Model:** In this model, registries and registrars would remain largely separate. Registries would be permitted to sell domain names through an affiliated ICANN accredited registrar up to a certain limit (somewhere between 20,000 and 100,000 names). This model would support small new registries and enable them to become competitive in the domain name market. A variation of the model would allow registries to sell domain names directly, without going through a registrar, up to a certain limit (50,000 names was suggested).
2. **Cross-Ownership—Unlimited Threshold Model:** In this model, suggested by Demand Media, no ownership separation between registries and registrars would be required. Registrars would be able to own and sell domain names through a registry. Supporters of the model, including GoDaddy, stated that "if cross-ownership works for the first 50,000 names, there is no sound reason to limit it there."
3. **Cross-Ownership—Zero Threshold:** This model, suggested by NeuStar, recommends that registries be allowed to own registrars, as long as the registrars do not sell domain names within the TLD owned by the registry.
4. **Maintenance of Registry-Registrar Separation:** ICANN's Intellectual Property Constituency (IPC) expressed worries that the relaxation of this requirement may force ICANN to adopt a more active role in monitoring and enforcing compliance. The Public Interest Registry also objected to vertical integration on the grounds that "public interest in supporting competition does not favor a breakdown of the current separation of registry and registrar ownership."

ICANN staff considered these options and proposed a model that would slightly relax cross-ownership restrictions. Under the staff model, gTLD registries would be required to use ICANN-accredited registrars and to avoid discriminating between registrars. Registries would also be required to provide six months' notice before changing prices for domain name renewals. Registrars would be allowed to sell domains in an affiliated registry, with a limit of 100,000 domain names. This model was included in the second version of the Draft Applicant Guidebook, published on February 18, 2009, as part of the proposed draft registry agreement.¹³³

At the June 2009 ICANN meeting in Sydney, two economic consultants—Steven Salop, Professor of Economics and Law at Georgetown University, and Joshua Wright, Assistant Professor of Law and Economics at George Mason University—gave a presentation on vertical integration and

¹³² ICANN, "New gTLD Program Explanatory Memorandum: Registry-Registrar Separation," February 18, 2009, <http://www.icann.org/en/topics/new-gtlds/registry-registrar-separation-18feb09-en.pdf>.

¹³³ ICANN, "New gTLD Agreement: Proposed Draft (v2)," February 18, 2009, <http://www.icann.org/en/topics/new-gtlds/draft-agreement-clean-18feb09-en.pdf>.

participated in a question and answer session on the implications of registry-registrar cross-ownership.¹³⁴ Salop and Wright were later commissioned by ICANN to produce a review of vertical integration options in advance of ICANN's February 2010 Board meeting. The paper was made available to the public in March in order to "inform the public debate on the topic."¹³⁵ The review recommends that ICANN adopt vertical separation rules regulating when a registry or registrar may acquire ownership interest in an entity at the opposite level and that these rules be based on market share. It further recommends that ICANN, rather than automatically prohibiting registries and registrars from acquiring this interest when they are above a certain market share threshold, instead notify the appropriate government authorities and make the ultimate decision to allow or disallow the acquisition based on their response.

At the March 2010 ICANN meeting in Nairobi—less than a week after the paper was made public—the ICANN Board resolved that "within the context of the new gTLD process, there will be strict separation of entities offering registry services and those acting as registrars. No co-ownership will be allowed." The Board cited the desire to avoid conflicts with the possible development of a new GNSO policy on vertical integration as well as the need to move forward with the gTLD process as major factors in its decision; it stated that if a GNSO policy is developed and approved by the Board prior to the launch of new gTLDs, that policy will be incorporated into the new gTLD program.¹³⁶ In the interviews, it was suggested that this resolution, rather than a final decision by the Board, was a measure intended move the gTLD process forward while forcing stakeholders to work within the GNSO working group to develop a consensus.¹³⁷

The GNSO had previously requested that ICANN staff prepare an issues report on vertical integration for submission to the GNSO Council. This request was prompted by a request from the Noncommercial Users Constituency (NCUC). The NCUC request, made in September 2009, referred to an August 27, 2009 statement by the NCUC that read in part:

*Vertical separation of registries and registrars is a policy issue—one of the most fundamental policies underlying ICANN's regulation of the domain name industry. And yet this important policy change is being handled as if it were an "implementation" decision that can be inserted into new gTLD contracts.*¹³⁸

In the GNSO issues report, published on December 11, 2009, ICANN staff recommended that the GNSO "delay a PDP [policy development process] on vertical integration, and instead...provide focused timely input through the implementation process that is currently underway for the New

¹³⁴ Steve Salop and Joshua Wright, "Vertical Integration Between Registries and Registrars—The Economic Pros and Cons," June 22, 2009, <http://syd.icann.org/files/meetings/sydney2009/presentation-vertical-separation-22jun09-en.pdf>.

¹³⁵ John Jeffrey, "Vertical Integration Options Report Available to Community," *ICANN Blog*, March 8, 2010, <http://blog.icann.org/2010/03/vertical-integration-options-report-available-to-community/>.

¹³⁶ ICANN, "Adopted Board Resolutions — Nairobi," March 12, 2010, <http://www.icann.org/en/minutes/resolutions-12mar10-en.htm>.

¹³⁷ Interviews, September 2010.

¹³⁸ NCUC, "Noncommercial Users Constituency statement on vertical separation of registries and registrars," August 27, 2009, http://listserv.syr.edu/scripts/wa.exe?A3=ind0908&L=NCSG-NCUC-DISCUSS&E=base64&P=4946980&B=-_002_75822E125BCB994F8446858C4B19F0D78FFC6D85SUEX07MBX04adsy_&T=application%2Fpdf;%20name=%22NCUC-Ry-Rr-vertical.pdf%22&N=NCUC-Ry-Rr-vertical.pdf&attachment=q.

gTLD Program.”¹³⁹ The staff also stated that “since the GNSO’s approval is not required, resolving the vertical integration issue through the implementation processes that are currently underway instead of through a PDP would be consistent with the ICANN Bylaws.” In a blog post on the Internet Governance Project, Milton Mueller criticized this description of how vertical integration should be handled within ICANN, writing:

*In this new theory of ICANN, the GNSO has no specific policy making role. Its status as the “home” or starting point of all policies related to generic names is not enshrined in the bylaws; its participation “is not required” either to initiate or to ratify policies pertaining to generic names. What this means, for those of you not steeped in ICANN arcana, is that there is no such thing as a bottom up process in ICANN.*¹⁴⁰

The GNSO formed a vertical integration working group via a GNSO Council resolution on March 10, 2010. Between March 12 and March 31, 2010, it issued a call for participants.¹⁴¹ On March 29, 2010, the GNSO Council announced that the Vertical Integration PDP Working Group was seeking comments “on any aspect related to the topic of vertical integration between registries and registrars that [commenters] think should be taken into account by the Working Group as part of its deliberations.”¹⁴² The GNSO encouraged comments on the CRAI report published in October 2008, on the study published by Salop and Wright, and on the March 2010 Board resolution. The public comment period was open until April 18, 2010.

The ICANN staff summary of these comments was published on April 22, 2010. Six comments were received. The summary noted that the working group had requested that constituencies and stakeholder groups submit their statements by May 6, 2010.¹⁴³

The GNSO’s work on vertical integration is still underway. A summary of vertical integration proposals currently being considered by the GNSO working group can be found on the ICANN wiki.¹⁴⁴ Additional GNSO documents on vertical integration can be found on the GNSO site.¹⁴⁵

3.8 Internationalized Domain Names

Internationalized domain names (IDNs) have existed at the second level, in TLDs such as .cn and .tw, since 2000. At the March 2003 ICANN meeting, ICANN’s IDN Registry Implementation

¹³⁹ GNSO, “GNSO Issues Report on Vertical Integration Between Registries and Registrars,” December 11, 2009, <http://gnso.icann.org/issues/vertical-integration/report-04dec09-en.pdf>.

¹⁴⁰ Milton Mueller, “ICANN Staff finally admits it: There is no bottom up process and no difference between ‘policy’ and ‘implementation,’” *Internet Governance Project Blog*, December 11, 2009, http://blog.internetgovernance.org/blog/_archives/2009/12/11/4402569.html.

¹⁴¹ GNSO, “Call for Participation on the Vertical Integration Policy Development Process (PDP) Working Group,” March 12, 2010, <http://gnso.icann.org/announcement/announcement-12mar10-en.htm>.

¹⁴² ICANN, “Public Comment: GNSO Policy Development Process on Vertical Integration Between Registries and Registrars,” March 29, 2010, <http://www.icann.org/en/announcements/announcement-3-29mar10-en.htm>.

¹⁴³ ICANN, “Summary of Public Comment on the Initiation of the GNSO Policy Development Process,” April 22, 2010, <http://forum.icann.org/lists/pdp-vertical-integration/pdfTUjS7ytxAJ.pdf>.

¹⁴⁴ ICANN, “Vertical Integration PDP,” https://st.icann.org/vert-integration-pdp/index.cgi?https_st_icann_org_vert_integration_pdp_index_cgi_vi_resources.

¹⁴⁵ GNSO, “Issues,” <http://gnso.icann.org/issues/>.

Committee submitted a set of guidelines for IDNs. At that meeting, the ICANN Board resolved to endorse the draft, to authorize the President to implement the guidelines it contained, and to allow ICANN to proceed with the registration of IDNs in registries that made agreements with ICANN based on the guidelines.¹⁴⁶ The guidelines were formally published on June 20, 2003.¹⁴⁷ Many TLDs—including .museum and .info—began accepting second level IDNs in 2004.¹⁴⁸

In September 2007, the ccNSO approved the launch of a policy development process on IDN ccTLDs.¹⁴⁹ The GNSO recommendations for new top-level domains, approved by the GNSO Council the same month, also stated that “some new generic top-level domains should be internationalised domain names (IDNs) subject to the approval of IDNs being available in the root.”¹⁵⁰ The current (fourth) version of the DAG allows the submission of applications for IDN gTLDs.¹⁵¹

Previously, in December 2006, the ICANN Board had resolved to request the ccNSO and the GAC to produce an issues paper on the introduction of IDN ccTLDs associated with ISO 3166 two-letter country codes (these codes are currently used in ccTLDs, for example .us or .uk).¹⁵² In June 2007, after the ccNSO and the GAC submitted a list of questions to the Board to be considered before the introduction of IDN ccTLDs, the Board “respectfully request[ed] that the ICANN community including the GNSO, ccNSO, GAC, and ALAC continue to work collaboratively, taking the technical limitations and requirements into consideration, to explore both an interim and an overall approach to IDN ccTLDs associated with the ISO 3166-1 two-letter codes and recommend a course of action to the Board in a timely manner.”¹⁵³

On October 30, 2009, the ICANN Board approved the IDN Fast Track Process, which allows nations and territories to register top-level domains reflecting their name or country code in their national languages.¹⁵⁴ The process formally launched on November 16, 2009, and the first four IDN ccTLDs—for Egypt, the Russian Federation, Saudi Arabia and the United Arab Emirates—were added to the root in May 2010.¹⁵⁵

¹⁴⁶ ICANN, “Minutes,” March 27, 2003, <http://www.icann.org/en/minutes/minutes-27mar03.htm#InternationalizedDomainNames>.

¹⁴⁷ ICANN, “Guidelines for the Implementation of Internationalized Domain Names,” June 20, 2003, <http://www.icann.org/en/general/idn-guidelines-20jun03.htm>.

¹⁴⁸ Chuck Gomes, “The Why & How of IDN Generic Domain Names,” May 13, 2010, http://russia2010.intgov.net/files/Gomes2_RIGF2010.ppt.

¹⁴⁹ ccNSO, “ccNSO Council Minutes,” September 7, 2007, <http://ccnso.icann.org/about/minutes/ccnso-minutes-12sep07.pdf>.

¹⁵⁰ GNSO, “Final Report - Introduction of New Generic Top-Level Domains,” August 8, 2007, <http://gns0.icann.org/issues/new-gtlds/pdp-dec05-fr-part08aug07.htm>.

¹⁵¹ ICANN, “Draft Applicant Guidebook, Version 4,” May 31, 2010, <http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-28may10-en.pdf>.

¹⁵² ICANN, “Adopted Resolutions from ICANN Board Meeting,” December 8, 2006, http://www.icann.org/en/minutes/resolutions-08dec06.htm#_Toc27198296.

¹⁵³ ICANN, “Adopted Board Resolutions—San Juan, Puerto Rico,” June 29, 2007, <http://www.icann.org/en/minutes/resolutions-29jun07.htm#m>.

¹⁵⁴ ICANN, “ICANN Bringing the Languages of the World to the Global Internet,” October 30, 2009, <http://www.icann.org/en/announcements/announcement-30oct09-en.htm>.

¹⁵⁵ Tina Dam, “IDN ccTLDs—The First Four,” *ICANN Blog*, May 13, 2010, <http://blog.icann.org/2010/05/idn-cctlds-%E2%80%93-the-first-four/>.

The announcement of the IDN ccTLD Fast Track Process prompted concerns that IDN gTLDs were being left behind. Some attendees at the public forum held during the October 2009 ICANN meeting expressed worries that, by putting ccTLDs first, ICANN was essentially forcing applicants to submit their domain name applications to governments.¹⁵⁶ Others noted that businesses who wanted to make their web content accessible via IDNs would be required to register multiple domains—one in each ccTLD—rather than registering a single domain in an IDN gTLD.¹⁵⁷

Some interviewees supported ICANN's decision to separate the progress of IDN ccTLDs from IDN gTLDs in order to avoid unnecessarily delaying ccTLDs and expressed appreciation for the speed at which the IDN ccTLD Fast Track Process was developed. In interviews, it was suggested that the development of the Fast Track Process was a good example of cross-community collaboration between the ccNSO and the GAC. Some interviewees expressed concerns that policy development for IDNs had preceeded the thorough setting and evaluation of technical standards for IDNs.¹⁵⁸

¹⁵⁶ Evan Ramstad, "Sparks Fly at Icann Meeting in Seoul," *Wall Street Journal*, October 29, 2009, <http://blogs.wsj.com/digits/2009/10/29/sparks-fly-at-icann-meeting-in-seoul/>.

¹⁵⁷ ICANN, "Transcript: Public Forum," October 29, 2009, <http://sel.icann.org/meetings/seoul2009/transcript-public-forum-29oct09-en.txt>.

¹⁵⁸ Interviews, September 2010.

Appendix D: The .xxx Domain Case and ICANN Decision-Making Processes

Abstract

In 2000, ICANN initiated a “proof of concept” stage to begin the adoption of new generic TLDs. ICM Registry unsuccessfully proposed .xxx and .kids. In 2003, after some exchanges with ICANN regarding its first proposal, ICM submitted a revised bid for the creation of .xxx for ICANN’s call for sponsored TLD proposals. The ICANN Board adopted a resolution to begin negotiating the commercial and technical terms of a registry agreement with ICM in June 2005; however, under pressure from a variety of constituencies, ICANN reversed its decision and denied ICM’s proposal in 2007. ICM filed a request for Independent Review in 2008—the first such request to be heard before the Independent Review Panel (IRP) in ICANN’s history. In 2010, a three-person panel of arbiters (which comprised the IRP) decided in favor of ICM.

This case study outlines the key events surrounding the .xxx proposals from 2000 to June 17, 2010, without re-examining the merits of the application itself. This chronology is designed to examine two specific dimensions of the .xxx process: (1) the role of the Independent Review Panel (IRP), and (2) the interaction between the Governmental Advisory Committee (GAC) and the ICANN Board during ICANN’s evaluation of the ICM .xxx proposal, registry agreement negotiations with ICM and, ultimate rejection of ICM’s application.

Case Study Sources and Methodology

For more information on our sources and methodology, please see Appendix A.

This case study is based on publicly available materials, including public comments, ICANN documents, academic studies, media reports, and expert opinions. It provides a summary of the facts regarding the .xxx domain process, with a specific focus on two aspects of the case: the Independent Review Panel (IRP), including ICM’s request for Independent Review, and the role of the Governmental Advisory Committee (GAC) throughout the Board’s review of the .xxx proposals, including its interaction with the Board. As per Exhibit B, Section 1 of the Services Agreement between the Berkman Center and ICANN, its goal is to help identify key issues, challenges and areas of disagreement related to the .xxx application process. The observations below will contribute to the Berkman team’s final report.

In addition to publicly available sources, this case study includes statements, opinions and perceptions of those we interviewed in the course of developing this case. These perceptions and opinions play an important role in the interpretation of ICANN decisions and their reception by the community. The statements of interviewees do not reflect the opinions or conclusions of the study team. While we have made every effort to remove factual inaccuracies, we do not attest to the accuracy of the opinions offered by interviewees. The interviews were conducted on the condition of confidentiality.

Note: As per the Services Agreement, this case study focuses on events prior to June 17, 2010. However, aspects of the .xxx case are still evolving. As such, this study may not reflect the most recent developments in this case.

Disclosure: Professor Jack Goldsmith, Henry L. Shattuck Professor of Law, Berkman Center Faculty Co-Director and member of the Berkman team, has submitted testimony for ICM in the .xxx case. In the context of the Berkman-internal peer review process, he provided comments on the scope and structure of an earlier draft of this case study.

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1 ICM's Proposal for the .xxx sTLD

1.1 ICANN's Call for New gTLDs in 2000

1.1.1 Overview of the "Proof of Concept" Round

The core of ICANN's mission is "to coordinate, at the overall level, the global Internet's system of unique identifiers," a mandate that includes responsibility for the allocation of domain names and management of the Domain Name System (DNS).¹ Since the 1980s, seven top-level domains (TLDs) have been in the DNS (.com, .edu, .gov, .int, .mil, .net, and .org), only three of which were available for public registration without restriction (.com, .net, and .org).² From the outset, one of ICANN's primary tasks was to develop a set of policies and best practices for the solicitation, creation, and management of new generic TLDs (gTLDs).³

The Domain Name Supporting Organization (DNSO), one of ICANN's original three supporting organizations (which was replaced by the Generic Names Supporting Organization (GNSO) in December 2002),⁴ was responsible for making recommendations on the "operation, assignment, and management of the domain name system and other related subjects."⁵ In 1999, the DNSO tasked a set of working groups with studying whether the creation of new gTLDs would be desirable, in light of intellectual property rights and other issues.⁶ On April 19, 2000, the DNSO recommended that the ICANN Board develop a set of policies to guide the introduction of a "limited number" of new gTLDs.⁷ The ICANN Board adopted this recommendation on July 16, 2000⁸ and began accepting TLD applications on September 5, 2000, with the goal of completing registry negotiations by the end of the year.⁹ Applicants were permitted to submit proposals for

¹ ICANN Bylaws, Article I, Section 1, September 30, 2009, <http://www.icann.org/en/general/archive-bylaws/bylaws-30sep09-en.htm>.

² ICANN, "Top-Level Domains (gTLDs)," May 6, 2009, <http://www.icann.org/en/tlds>. One other specialized TLD had also been implemented: .arpa, which is reserved to support the Internet Architecture Board's technical infrastructure projects (see <http://www.iana.org/domains/arpa/>). More than 250 country-code TLDs (ccTLDs) also exist, a handful of which are written in non-Latin characters and are categorized as Internationalized Domain Names (IDNs).

³ See ICANN, "Top-Level Domains (gTLDs)," May 6, 2009, <http://www.icann.org/en/tlds>.

⁴ The DNSO was eventually succeeded by the Generic Names Supporting Organizations (GNSO) in 2003. See DNSO, <http://www.dnsso.org/>

⁵ ICANN Bylaws, Article VII, Section 3(a), November 6, 1998, <http://www.icann.org/en/general/archive-bylaws/bylaws-06nov98.htm>.

⁶ A 1999 WIPO report stated that new gTLDs could be introduced slowly if intellectual property rights received adequate protection; see ICANN, "The Management of Internet Names and Addresses: Intellectual Property Issues," April 30, 1999, http://www.icann.org/en/wipo/FinalReport_1.html. The DNSO's Working Groups B and C were established to address the WIPO report and other intellectual property concerns; see DNSO, "Meeting of the Names Council in San Jose on 25 June 1999," June 25, 1999, <http://www.dnsso.org/dnsso/notes/19990625.NCsj-admin.html>.

⁷ DNSO, "DNSO Names Council Statement on new gTLDs," April 19, 2000, <http://www.dnsso.org/dnsso/notes/20000419.NCgtlds-statement.html>.

⁸ ICANN, "Resolutions of the ICANN Board on New TLDs," July 16, 2000, <http://www.icann.org/en/tlds/new-tld-resolutions-16jul00.htm>.

⁹ ICANN, "New TLD Application Process Overview," August 3, 2000, <http://www.icann.org/en/tlds/application-process-03aug00.htm>.

either a “sponsored TLD” (sTLD) or an “unsponsored TLD”¹⁰ and each application was required to satisfy nine criteria:

1. The need to maintain the Internet’s stability.
2. The extent to which selection of the proposal would lead to an effective “proof of concept” concerning the introduction of TLDs in the future.
3. The enhancement of competition for registration services.
4. The enhancement of the utility of the DNS.
5. The extent to which the proposal would meet previously unmet types of needs.
6. The extent to which the proposal would enhance the diversity of the DNS and of registration services generally.
7. The evaluation of delegation of policy-formulation functions for special-purpose TLDs to appropriate organizations.
8. Appropriate protections of rights of others in connection with the operation of the TLD.
9. The completeness of the proposals submitted and the extent to which they demonstrate realistic business, financial, technical, and operational plans and sound analysis of market needs.¹¹

“General-Purpose” TLD proposals were grouped into four categories: “General” (for nonspecific proposals, including .biz and .info), “Personal” (for personal content, including .name and .san), “Restricted Content” (for specific types of content, including .xxx and .kids), and “Restricted Commercial” (including .law and .travel).¹²

1.1.2 ICM’s Proposal for .xxx and .kids

ICANN received 47 applications with proposals for new sponsored and unsponsored TLDs.¹³ Three organizations submitted proposals for .xxx,¹⁴ including ICM Registry, Inc. (ICM), which applied to create .xxx and .kids, arguing that, together, the pair of new TLDs would enhance

¹⁰ Sponsored TLDs (sTLDs) are intended to represent the needs of a particular “sponsored community,” and are required the support of a “sponsoring organization” to be responsible for a defined level of policy formulation for operation of the domain. Unsponsored domains do not carry either of these requirements. See ICANN, “New TLD Application Process Overview,” August 3, 2000, <http://www.icann.org/en/tlds/application-process-03aug00.htm>.

¹¹ ICANN, “Criteria for Assessing TLD Proposals,” August 15, 2000, <http://www.icann.org/en/tlds/tld-criteria-15aug00.htm>.

¹² ICANN, “Report on New TLD Applications,” November 9, 2000, <http://www.icann.org/en/tlds/report/>. In addition to “General-Purpose TLDs,” ICANN also grouped proposals as “Special-Purpose” (synonymous with “sponsored”) and “New Services” (which was intended for technical services not currently supported by the existing DNS, including telephony, message routing, LDAP services, and “georeferenced information.”

¹³ ICANN, “TLD Applications Lodged,” October 10, 2000, <http://www.icann.org/en/tlds/tld-applications-lodged-02oct00.htm>.

¹⁴ ICANN, “TLD Applications Lodged,” October 10, 2000, <http://www.icann.org/en/tlds/tld-applications-lodged-02oct00.htm>.

online child safety by clearly delineating child-friendly and adult-only content areas.¹⁵ ICM also contended that both the adult industry and child-friendly content producers would comply with ICM's policies voluntarily, claiming that "adult content leaders fully back the establishment of these TLDs" and that "eminent children's entertainment and educational organizations are promising extensive investments in the child-friendly domain."¹⁶

Out of these 47 applications, ICANN selected seven during the exploratory phase: four unsponsored TLDs (.biz, .info, .name, .pro) and three sponsored (.aero, .coop, .museum).¹⁷ In applying the evaluation criteria to ICM's .xxx application, ICANN determined that ICM's proposal for a .kids TLD did meet unmet needs but was unlikely to succeed from a business standpoint.¹⁸ ICANN also found that ICM did not propose "any business or technical methods to effectively restrict content for a .kids TLD."¹⁹ Regarding .xxx, ICANN stated: "[It] does not appear to meet unmet needs. Adult content is readily available on the Internet. To the extent that some believe that an .xxx TLD would segregate adult content, no mechanism (technical or non-technical) exists to require adult content to migrate from existing TLDs to an .xxx TLD." ICANN also noted that the controversial nature of a sex-centric TLD made it ill-suited to the goals of the "proof of concept" phase: "the evaluation team concluded that at this early 'proof of concept' stage with a limited number of new TLDs contemplated, other proposed TLDs without the controversy of an adult TLD would better serve the goals of this initial introduction of new TLDs."²⁰

Ultimately, ICANN decided to not accept ICM's proposals for .xxx and .kids, providing the following justification:

Because of the inadequacies in the proposed technical and business measures to actually promote kid-friendly content, the evaluation team does not recommend selecting a .kids domain in the current phase of the TLD program. In addition, because of the controversy surrounding, and poor definition of the hoped-for benefits of, .xxx, we also recommend against its selection at this time.²¹

In response, ICM filed a Reconsideration Request on December 15, 2000, requesting "clarification from the Board with respect to inaccurate statements made involving [the .xxx] registry

¹⁵ ICANN, "Registry Operator's Proposal to ICANN," September 18, 2000, <http://www.icann.org/en/tlds/kids3/Default.htm>. ICM's application also hypothesized that the adult oriented content on other domains (e.g., affiliated sites) could be easily filtered by IP addresses and proprietary DNS listings in addition to filtering the .xxx content. Ibid.

¹⁶ ICANN, "Registry Operator's Proposal to ICANN: Volume 2," September 18, 2000, http://www.icann.org/en/tlds/kids3/HTML/Volume_2.html.

¹⁷ ICANN, "Second Annual Meeting of the Board Minutes," November 16, 2000, <http://www.icann.org/en/minutes/minutes-annual-meeting-16nov00.htm>.

¹⁸ ICANN, "Report on TLD Applications: Application of the August 15 Criteria to Each Category or Group," November 9, 2000, <http://www.icann.org/en/tlds/report/report-iiib1c-09nov00.htm>.

¹⁹ ICANN, "Report on TLD Applications: Application of the August 15 Criteria to Each Category or Group," November 9, 2000, <http://www.icann.org/en/tlds/report/report-iiib1c-09nov00.htm>.

²⁰ Ibid.

²¹ Ibid.

proposal.”²² Primarily, ICM took issue with the ICANN Board’s claim that the majority of the adult community did not support the creation of .xxx, and argued that “most” adult content providers supported the domain. ICM also maintained that it proposed to operate the .kids registry “only in the event that there was no other credible submission for a .kids registry.”²³ Finally, ICM disagreed with the TLD evaluators’ conclusion that .xxx did not meet an “unmet need,” arguing that the proliferation of online adult material necessitated the creation of the kind of domain policies ICM had proposed.

The Reconsideration Committee decided to take no action, stating, “ICM Registry’s reconsideration request does not seek reconsideration of the Board’s November 16, 2000 decision . . . accordingly, there is no action for the Board to take with respect to the Board’s actual decision at this time.”²⁴ It noted that “no new TLD proposal has been rejected by ICANN”; rather, a small set of potentially successful applicants had been selected with the aim of testing a diversity of approaches to the creation of new TLDs. The Committee also noted that “the fact that a new TLD proposal was not selected under those circumstances should not be interpreted as a negative reflection on the proposal or its sponsor.”²⁵

1.2 ICANN’s Request for Proposals for New sTLDs in 2003

1.2.1 Overview of the RFP

On October 18, 2002, ICANN President Stuart Lynn issued a report titled “A Plan for Action Regarding New TLDs,” which advocated extending the “proof of concept” phase by allowing applicants who had participated in the 2000 round to resubmit their TLD proposals.²⁶ On December 15, 2002, in response to the “Plan for Action,” the ICANN Board directed ICANN staff to develop a strategy for soliciting further TLD applications.²⁷ This resulted in a draft Request for Proposals (RFP) for the creation of new sponsored TLDs, posted publicly on June 24, 2003.²⁸

The 2003 RFP differed from the 2000 “proof of concept” solicitation in two important ways. First, it was restricted to proposals for *sponsored* TLDs. Applicants were required to demonstrate that

²² ICANN, “Reconsideration Request 00-15,” December 16, 2000, <http://www.icann.org/en/committees/reconsideration/icm-request-16dec00.htm>. ICANN’s Reconsideration Policy (which has since been superseded) had been established to implement Article III, Section 4(a) of the original Bylaws. ICANN, “Reconsideration Policy,” March 4, 1999, <http://www.icann.org/en/committees/reconsideration/recon-policy-04mar99.htm>.

²³ See “Reconsideration Request,” Ibid.

²⁴ Although unclear in the Recommendation, it appears the Reconsideration Committee’s mandate is only to *reconsider* decisions and issue recommendations, rather than clarify Board decisions. See ICANN, “Reconsideration Request 00-15: Recommendation of the Committee (Revised),” September 7, 2001, <http://www.icann.org/en/committees/reconsideration/rc00-15-1.htm>.

²⁵ Ibid.

²⁶ ICANN, “A Plan for Action Regarding New TLDs,” October 18, 2002, <http://www.icann.org/en/committees/ntepptf/new-gtld-action-plan-18oct02.htm>.

²⁷ ICANN, “ICANN 2002 Annual Meeting in Amsterdam,” December 14–15, 2002, <http://www.icann.org/en/meetings/amsterdam>.

²⁸ ICANN, “Establishment of new sTLDs: Request for Proposals (Draft for public comment),” June 24, 2003, <http://www.icann.org/en/tlds/new-stld-rfp/new-stld-rfp-24jun03.htm>.

the sTLD served the needs of a well-defined “sponsored community,” and the proposal was required to carry the support of a “sponsoring organization,” which would assume certain responsibilities in developing policies for the TLD. Second, the ICANN Board would not evaluate applications directly. Rather, applications were to be evaluated by several panels of independent evaluators who would submit reports on each proposal to the ICANN Board; the reports, while nonbinding, were intended to play a significant role in shaping the Board’s decisions.²⁹

On June 25, 2003—the day after the draft RFP was posted for public comment—ICANN held a public discussion on the draft materials during a Public Forum in Montréal. Some commenters argued that a single day was inadequate for public review, particularly given the controversy that persisted around the proposed TLD policies.³⁰ On the following day, the ICANN Board resolved to extend the public comment period for two months, through August 25, 2003.³¹

ICANN received more than 70 responses by email, which it posted publicly during the comment period.³² The At-Large Advisory Committee (ALAC) also submitted a formal response, recommending substantive changes to make the RFP more equitable and proposing a set of principles to guide the introduction of future gTLDs.³³

On October 13, 2003, the ICANN Board decided it would temporarily shelve the sTLD application process, citing the constraints of the recent amendments to the Memorandum of Understanding with the United States Department of Commerce—particularly the requirement that ICANN quickly “commence a full scale review of policy in this area.”³⁴ The Generic Names Supporting Organization (GNSO)³⁵ strongly objected, however, and on October 31, 2003, the ICANN Board reversed its decision and resolved to move forward with the sTLD RFP. Additionally, the Board resolved to revise the terms of the RFP based on commentary from the ALAC, the GNSO, and the public at large. Specifically, it resolved that the RFP would not be limited to applicants who had submitted proposals during the 2000 “proof of concept” round and that eligible sponsoring organizations need not be not-for-profit entities. Finally, it resolved that a final version of the RFP would be posted on December 15, 2003, including an application timeline, the details of the selection criteria, and an explanation of the evaluation process.³⁶

²⁹ Ibid. See also ICANN, “Independent Evaluators of sTLD Proposals,” <http://icann.org/en/tlds/new-stld-rfp/panel.htm>.

³⁰ See Edward Hasbrouck, “Sponsored TLD RFP,” June 26, 2003, <http://hasbrouck.org/icann/montreal.html>.

³¹ ICANN, “Preliminary Report: Regular Meeting of the Board - Montréal,” June 26, 2003, <http://www.icann.org/en/minutes/prelim-report-26jun03.htm>.

³² ICANN, “Submissions to the stld-rfp-comments forum,” <http://forum.icann.org/mtg-cmts/stld-rfp-comments/general/threads.html> (no date).

³³ ICANN, “ALAC Response to the Proposed sTLD RFP and Suggested Principles for New TLD Processes,” October 9, 2003, <http://forum.icann.org/mtg-cmts/stld-rfp-comments/general/msg00067.html>.

³⁴ ICANN, “Preliminary Report: Special Meeting of the Board,” October 13, 2003, <http://www.icann.org/en/minutes/prelim-report-13oct03.htm>.

³⁵ As of 2003, the GNSO became the successor to the DNSO. See DNSO website, <http://www.dnsso.org>.

³⁶ ICANN, “ICANN Board Resolutions in Carthage, Tunisia,” October 31, 2003, <http://www.icann.org/en/announcements/advisory-31oct03.htm>. The final version of the sTLD RFP is available at ICANN, “New sTLD Application,” December 15, 2003, <http://www.icann.org/en/tlds/new-stld-rfp/new-stld-application-part-15dec03.htm>.

1.2.2 ICM's Proposal for .xxx

ICM submitted its .xxx sTLD proposal on March 16, 2004. ICM named the “online adult-entertainment community” as the sponsoring community, defining this community as “those individuals, businesses, and entities that provide sexually-oriented information, services, or products intended for consenting adults or for the community itself.”³⁷ ICM named the International Foundation for Online Responsibility (IFFOR) as its sponsoring organization.³⁸ The role of IFFOR, a Canadian non-profit, would be to protect child safety, guard the safety and privacy of users, and promote responsible business practices in the adult industry. According to the proposal, ICM intended to donate a certain portion of each domain registration fee to promote IFFOR’s policymaking and advocacy efforts.³⁹

1.2.3 ICANN's Review and Initial Approval

On March 19, 2004, ICANN publicly announced that it had received ten sTLD applications in response to its RFP: .asia, .cat, .jobs, .mail, .mobi, .post, .tel (NetNumber, Inc), .tel (Telnic Ltd.), .travel, and .xxx. This announcement included invitations to post comments on specific proposals, in addition to a solicitation for general public comments. It also noted that the public comment period would be open during the month of April 2004 and that applications would be reviewed by independent evaluators beginning in May of that year.⁴⁰

In mid-July 2004, the independent evaluators sent reports on the ten applications to ICANN indicating that only .cat and .post satisfied the full range of evaluation criteria.⁴¹ The report declared that ICM’s proposal satisfied the technical, business, and financial criteria, but fell short of meeting the sponsorship criteria.⁴² In particular, the report stated that “the difficulty of establishing a clean definition of adult content makes it equally difficult to establish the contours of the adult community. They determined, moreover, that ICM “hypothesizes a set of interests on behalf of a community . . . but little testimony from that community has been provided in support of either its common interests or its cohesiveness.”⁴³ Finally, the evaluators note that although there was significant support for the proposal from the North American community, “virtually no support was available from the rest of the world.”⁴⁴

³⁷ ICANN, “New sTLD RFP Application: .xxx,” March 16, 2004, <http://www.icann.org/en/tlds/stdl-apps-19mar04/xxx.htm>.

³⁸ ICANN, “New sTLD RFP Application: .xxx,” March 16, 2004, <http://www.icann.org/en/tlds/stdl-apps-19mar04/xxx.htm>.

³⁹ Ibid.

⁴⁰ ICANN, “Progress in Process for Introducing New Sponsored Top-Level Domains,” March 19, 2004, <http://www.icann.org/en/announcements/announcement-19mar04.htm>. See also, ICANN, “Public Comments for Proposed Sponsored Top-Level Domains,” March 31, 2004, <http://www.icann.org/en/tlds/stdl-apps-19mar04/stdl-public-comments.htm>.

⁴¹ See ICANN, “Status Report on the sTLD Application Process,” December 3, 2005, <http://www.icann.org/en/tlds/stdl-apps-19mar04/stdl-status-report.pdf>.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid., 24–25.

ICANN announced that it would allow sTLD applicants to provide supplemental material in response to the independent evaluators' concerns.⁴⁵ From October through November 2004, ICM submitted a range of supplemental application material, primarily addressing the .xxx proposal's deficiencies regarding sponsorship criteria.⁴⁶

2 Involvement of the GAC in the .xxx Process

2.1 The Role of the GAC in ICANN

According to the ICANN Bylaws,⁴⁷ one of the primary purposes of the Governmental Advisory Committee (GAC) is to "consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN's policies and various laws, and international agreements or where they may affect public policy issues."⁴⁸

The GAC may submit "issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies."⁴⁹ Apart from receiving unsolicited advice or comment, the Board is required to "notify the Chair of the GAC in a timely manner of any proposal raising public policy issues on which it or any of ICANN's supporting organizations seeks public comment."⁵⁰ Separately, the Board is required to "request the opinion" of the GAC in cases where "policy action affects public policy concerns" and the policy being considered for adoption "substantially affect[s] the operation of the Internet or third parties."⁵¹

Regardless of whether solicited or not, any GAC advice "on public policy matters" triggers a Bylaw provision whereby the Board is required to take such advice into account "both in the formulation and adoption of policies."⁵² If the Board decides not to follow this advice, the Board is then required to notify the GAC and "state the reasons why it decided not to do so" and "try, in

⁴⁵ ICANN, "ICANN Meetings in Kuala Lumpur," July 23, 2004, <http://www.icann.org/en/meetings/kualalumpur/captioning-public-forum-23jul04.htm>.

⁴⁶ ICANN, "Appendix E – Supplemental/Follow-up Materials," November 30, 2005, <http://www.icann.org/en/tlds/stld-apps-19mar04/AppE-30nov05.pdf>.

⁴⁷ ICANN Bylaws, August 5, 2010, <http://www.icann.org/en/general/bylaws.htm>. ICANN's Bylaws have been amended 26 times from the original Bylaws. Archives of previous versions are available on the ICANN website at <http://www.icann.org/en/general/archive-bylaws>.

⁴⁸ *Ibid.*, Article XI, Section 2.1(a). ICANN's original Bylaws did not include the phrase "where they may affect public policy issues," which was appended to the original in 2002. ICANN Bylaws, Article XI, Section 2.1(a), November 6, 1998, <http://www.icann.org/en/general/archive-bylaws/bylaws-06nov98.htm>.

⁴⁹ *Ibid.*, Article XI, Section 2.1(i). It is unclear whether the terms "comment" and "advice" are distinct concepts and are intended to have different meaning.

⁵⁰ *Ibid.*, Article XI, Section 2.1(h).

⁵¹ *Ibid.*, Article III, Section 6.1(c). Although this provision does use the term "advice," which by itself is consistent with the use in Article XI, Section 2.1; "advice" appears to be used interchangeably with "opinion." Consequently, the precise scope of this provision is unclear, especially with regard to how it interplays with Article XI, Section 2.1.

⁵² *Ibid.*, Article XI, Section 2.1(j). Unlike the other provisions in Article XI, this provision uses the term "advice of the Governmental Advisory Committee" explicitly. This appears to suggest that the circumstances where the Board's requirement to give notice and explanation of actions inconsistent with advice is limited; however, it is somewhat unclear if that was the intended purpose of this provision.

good faith and in a timely and efficient manner, to find a mutually acceptable solution.”⁵³ If no solution is reached between the Board and the GAC, the Board is required to “state in its final decision the reasons why” the advice was not followed.

The ICANN Bylaws also permit the GAC to “appoint one non-voting liaison to the ICANN Board of Directors.”⁵⁴ The GAC Liaison to the Board is “entitled to attend Board Meetings, participate in Board discussions and deliberations.” The Liaison has “access (under conditions established by the Board) to materials provided to Directors for use in Board discussions” and may “use any materials provided to them pursuant to this Section for the purpose of consulting with their respective committee.”⁵⁵ The individual elected as the GAC Chair has been consistently appointed to the position of GAC Liaison to the Board has consistently Although not described within the ICANN Bylaws or the GAC Operating Principles,⁵⁶ interviewees stated that the GAC Liaison to the Board is generally expected to brief the Board on issues of concern amongst GAC members.⁵⁷ In addition, interviewees indicated that the Board believes the presence of the GAC Chair at Board Meetings, even if in the capacity of a Liaison to the Board, satisfies the “notification” requirement for proposals raising public policy issues without additional communications.⁵⁸ Other interviewees questioned this practice and stated that this interpretation of the Bylaws was not shared by GAC members.⁵⁹

According to the GAC Operating Principles, the GAC advises the Board on matters relating to “governments, multinational government organizations and treaty organizations, and distinct economies as recognized in international fora.”⁶⁰ The Operating Principles reflect the GAC’s internal operating principles and procedures, however, the articulations within this document are not necessarily binding on the ICANN Board.⁶¹ The Operating Principles specifically state that “advice from the GAC to the Board is communicated through the Chair.”⁶² When the GAC is unable to reach a consensus, the Chair is required to “convey the full range of view expressed by Members to the Board.”⁶³

⁵³ Ibid., Article XI, Section 2.1(j).

⁵⁴ Ibid., Article VI, Section 9.1(a) and Article XI, Section 2.1(g).

⁵⁵ Ibid., Article VI, Section 9.5.

⁵⁶ The ICANN Bylaws contain a provision which permits the GAC to adopt “its own charter and internal operating principles or procedures to guide its operations.” This provision appears to be manifested by the GAC Operating Principles. GAC Operating Principles, March 2010, http://gac.icann.org/system/files/GAC_Operating_Principles_1.pdf. Importantly, the Operating Principles note that the ICANN Bylaws are authoritative over any differences “in interpretation between the principles set out in these Operating Principles and ICANN’s Articles of Incorporation and Bylaws.” See also GAC Operating Principles, Article XV, Principle 54.

⁵⁷ Interviews, September and October 2010.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ GAC Operating Principles, Article I, Principle 1, March 2010.

⁶¹ Ibid., Article XV, Principle 54.

⁶² Ibid., Article XII, Principle 46.

⁶³ Ibid., Article XII, Principle 47.

2.2 The Role of the GAC in the .xxx Process: 2004

Between ICM's submission of its .xxx proposal on March 19, 2004 and the submission of the independent evaluators' report on July 13, 2004, there is little documented discussion of the sTLD applications during ICANN Board and GAC meetings.⁶⁴ Following receipt of this report, the Board determined that sTLD applicants would be permitted to submit supplemental information to address the evaluators' concerns, beginning in August 2004. ICM began submitting supplemental materials in October 2004.⁶⁵

On October 18, 2004, the ICANN Board held the first meeting since July 2004 during which a discussion of the sTLDs was documented. The corresponding meeting minutes indicate that "Kurt Pritz, the ICANN Vice President of Business Operations[,] provided a detailed summary of the current process of and status regarding the ten sponsored top-level domain applicants" and Paul Twomey, ICANN's President and CEO, also provided information on the sTLD applicants.⁶⁶ Mohamed Sharil Tarmizi, Chairman of the GAC, was present during this meeting as the "GAC Liaison."⁶⁷ No corresponding resolutions were made by the Board at this meeting.⁶⁸ Another meeting was held on November 15, 2004.⁶⁹ The minutes note that "Kurt Pritz again provided an update on the status of the process for each of the ten [sTLD] applicants," and there was a "limited discussion by the Board regarding the process points," but no resulting resolutions.⁷⁰

In a five-page letter to Tarmizi, dated December 1, 2004, Dr. Twomey requested "input from the GAC on the public policy elements" on several issues pending before the Board.⁷¹ Twomey also observed that, "it seems to me that the interaction between the GAC and ICANN staff would merit from some increase in intensity" and suggested "establish[ing] a GAC position for transmission to the Board on the public policy elements" of issues pending before the ICANN Board.⁷² Twomey also noted in this letter that "it may be worthwhile considering how the

⁶⁴ Between March and July 2004, both the Board and the GAC held meetings, but did not discuss the sTLD applications in significant detail. The Board held meetings on April 19, May 11, May 21, May 25, and June 29, 2004. See ICANN, "2004 Board Meeting Minutes," 2004, <http://www.icann.org/en/minutes/index-2004.html>. The GAC held meetings on February 29 – March 3, and July 17 – 20, 2004. See GAC, "GAC Meetings," <http://gac.icann.org/meetings>. See ICANN, "Status Report on the sTLD Evaluation Process," December 3, 2005, <http://www.icann.org/en/tlds/stld-apps-19mar04/stld-status-report.pdf>; Independent Evaluators, "Evaluation Report on New sTLD Applications," July 12, 2004, <http://www.icann.org/en/tlds/stld-apps-19mar04/PostAppD.pdf>.

⁶⁵ ICANN, "Appendix E – Supplemental/Follow-up Materials," November, 30, 2005, <http://www.icann.org/en/tlds/stld-apps-19mar04/AppE-30nov05.pdf>.

⁶⁶ ICANN, "Special Meeting of the Board Minutes," October 18, 2004, <http://www.icann.org/en/minutes/minutes-18oct04.htm>.

⁶⁷ Ibid. A liaison to the Board is a non-voting member, who is permitted to attend Board meetings. The Bylaws specify that the GAC must appoint the position of liaison annually. See ICANN Bylaws Art. VI. Sec. 9.

⁶⁸ ICANN, "Special Meeting of the Board Minutes," October 18, 2004, <http://www.icann.org/en/minutes/minutes-18oct04.htm>.

⁶⁹ ICANN, "Special Meeting of the Board Minutes," October 18, 2004, <http://www.icann.org/en/minutes/minutes-18oct04.htm>.

⁷⁰ ICANN, "Special Meeting of the Board Minutes," November 15, 2004, <http://www.icann.org/en/minutes/minutes-15nov04.htm>.

⁷¹ Ibid.

⁷² Paul Twomey to Mohamed Sharil Tarmizi, ICANN Correspondence, December, 1 2004, <http://www.icann.org/correspondence/twomey-to-tarmizi-01dec04.pdf>.

⁷³ Ibid.

interaction could be increased between the GAC and the other Supporting Organizations and Advisory Committees for the mutual benefit of both sides.”⁷³

The next section of this letter laid out the issues pending before the Board for which Twomey requested GAC input. In the following paragraph, Twomey outlined the status of the sTLD applications:

*ICANN continues to move forward on three (3) fronts in the area of **generic Top-Level Domains**. First of all, following the 10 applications for new sponsored TLD’s (sTLDs) and the evaluation of their bids by independent evaluators, we have commenced contract negotiations with the applicants for .TRAVEL and .POST. In parallel, the applicants are responding to the reports of the independent evaluators, and in some instance have entered into direct discussions with the evaluation panels in order to clarify some issues. Any outstanding issues between the independent panels and the applicants will be resolved by ICANN’s Board and we expect to move towards contract negotiations with some other applicants as well. Secondly, ICANN is about to launch the re-bid of the .NET agreement as foreseen in the relevant contract. GAC members can follow the process via the information we post to the ICANN web-site. Thirdly, as mentioned, we have published the draft of a Strategy for the Introduction of New gTLD’s.”⁷⁴*

2.3 The Role of the GAC in the .xxx Process: 2005

Despite receiving a number of supplemental materials from ICM in support of its application in late 2004, as of early 2005 the ICANN Board was still uncertain that ICM had satisfied the requirements for the .xxx sTLD. On January 24, 2005, the Board held a special meeting to discuss the status of ICM’s application. At this meeting, Kurt Pritz “introduced the .XXX application materials, evaluators’ responses and the applicant’s supplemental materials” and “there was extensive Board discussion regarding the application,” focused on ICM’s proposed sponsored community.⁷⁵ According the minutes, the Board determined that it would be useful for ICM to give a presentation and invited ICM to do so at a later Board meeting.⁷⁶ ICM delivered the presentation on April 3, 2005 in Mar del Plata, Argentina, a few days prior to the scheduled ICANN Board meeting,⁷⁷ to an audience of Board members and a number of Board liaisons, including Tarmizi.⁷⁸

⁷³ Ibid.

⁷⁴ Ibid., 4 (emphasis in the original).

⁷⁵ ICANN, “Special Meeting of the Board,” January 23, 2005, <http://www.icann.org/en/minutes/minutes-24jan05.htm>.

⁷⁶ Ibid.

⁷⁷ The ICANN Board held its regular meeting in Mar del Plata, Argentina on April 8, 2005.

⁷⁸ ICM, “Request for IRP,” June 6, 2008, at 28, <http://www.icann.org/en/irp/icm-v-icann/icm-irp-request-06jun08.pdf>.

Concurrently, the GAC convened in Mar del Plata on April 2–5 in 2005 for the first of three scheduled meetings in 2005.⁷⁹ The Mar del Plata Communiqué does not indicate that the GAC held any discussions related to the sTLDs or the .xxx application specifically.⁸⁰

On April 3, 2005,⁸¹ Tarmizi sent a letter to Paul Twomey responding to Twomey’s previous request for GAC input on December 1, 2004.⁸² In this letter, Tarmizi stated that the GAC had no objections to any of the sTLD applications:

*No GAC members have expressed specific reservations or comments, in the GAC, about the applications for sTLDs in the current round. However should sTLDs use ENUM, that should not interfere with established international policies for the E164 numbering system. ICANN should ensure that sponsors of sTLDs encompass the entirety of the relevant user community, and that eventual distortions of competition are effectively avoided.*⁸³

Following the April 3 special Board meeting, the Board met again for a regular meeting on April 8, 2005 in Mar del Plata.⁸⁴ The meeting minutes reflect that the Board hoped to reach a decision within thirty days:

*We have had a fairly extensive discussion about .ASIA and .XXX. We continue to evaluate those. The others will be attended as we can get to them. But, I want to say for the record, that we will attempt within the next 30 days to come to a conclusion one way or the other about .ASIA and .XXX.*⁸⁵

Approximately one month later, on May 3, 2005, the Board held another special meeting, and had a “broad discussion . . . whether or not the [.xxx application] met the criteria within the RFP particularly relating to the definition and coherence of the ‘sponsored community’.”⁸⁶ No conclusion was reached in these meetings, and “the Board agreed it would discuss this issue again at the next Board meeting.”⁸⁷

On June 1, 2005, the Board held another special meeting and discussed the .xxx application at length with a “particular focus on the ‘sponsored community’ issues.”⁸⁸ At this meeting, the

⁷⁹ GAC, “Meeting 22: Mar del Plata Communiqué,” April 5, 2005, http://gac.icann.org/system/files/GAC_22_Mar_del_Plata.pdf. The other meetings scheduled for 2005 included: Meeting 23: Luxembourg on July 9–12, 2005, and Meeting 24: Vancouver on November 28 – December 1, 2005. Cf. GAC, “Meetings,” <http://gac.icann.org/meetings>.

⁸⁰ Ibid.

⁸¹ The ICANN meeting minutes on this date and the Tarmizi letter do not indicate whether the letter was written and sent before or after the Board meeting on this date.

⁸² Mohamed Sharil Tarmizi to Paul Twomey, April 3, 2005, ICANN Correspondence, <http://www.icann.org/correspondence/tarmizi-to-twomey-03apr05.htm>.

⁸³ Ibid.

⁸⁴ ICANN, “Mar Del Plata Meeting,” April 8, 2005, <http://www.icann.org/en/meetings/mardelplata/captioning-BoD-meeting-08apr05.htm>.

⁸⁵ Ibid.

⁸⁶ ICANN, “Special Meeting of the Board,” May 3, 2005, <http://www.icann.org/en/minutes/minutes-03may05.htm>.

⁸⁷ Ibid.

⁸⁸ ICANN, “Special Meeting of the Board,” June 1, 2005, <http://www.icann.org/en/minutes/minutes-01jun05.htm>.

Board resolved to enter into negotiations with ICM for the technical and commercial terms of a contractual agreement relating to the delegation of the sTLD.⁸⁹ Whether this resolution indicated that ICM had adequately met the sTLD sponsorship criteria later became a factual dispute in the arbitration proceedings under the Independent Review Process beginning in 2008.⁹⁰

The GAC held its second meeting of the year in Luxembourg on July 7–12, 2005.⁹¹ The Luxembourg Communiqué does not specifically mention ICM’s application, the proposed .xxx sTLD, or the Board’s June 1, 2005 resolution to enter into contract negotiations with ICM. However, the Luxembourg Communiqué makes the following reference with regard to “new TLDs”:

*The GAC notes from recent experience that the introduction of new TLDs can give rise to significant public policy issues, including content. Accordingly, the GAC welcomes the initiative of ICANN to hold consultations with respect to the implementation of the new Top-level Domains strategy. The GAC looks forward to providing advice to the process. The GAC also encourages the Board to actively consult all constituencies with regard to the development of this strategy.*⁹²

This is the only reference in the Luxembourg Communiqué to the introduction of new TLDs; there are no references to sTLDs specifically.⁹³ The phrase “significant public policy issues” is not defined further in this document.⁹⁴

Following the Luxembourg meetings, the ICANN Board met in September and resolved that the ICANN General Counsel and the CEO and President, “are directed to discuss possible additional contract provisions or modifications for inclusion in the .xxx registry agreement” which, among other things, ensure the “development and implementation of policies consistent with the principles in the ICM application.”⁹⁵ The ICANN Board posted the first draft registry agreement for the .xxx sTLD on the ICANN website for public comment on August 9, 2005.⁹⁶

Three days later, on August 12, in a letter addressed to “the ICANN Board,” Tarmizi expressed the GAC’s discomfort with the possibility of a .xxx sTLD:

In other GAC sessions, a number of other governments also expressed some concern with the potential introduction of this TLD. The views are diverse and wide ranging. Although not necessarily well articulated in Luxembourg, as Chairman, I believe there remains a

⁸⁹ Ibid.

⁹⁰ See ICM Request for Independent Review Process, June 6, 2008, <http://icann.org/en/irp/icm-v-icann/icm-irp-request-06jun08.pdf>.

⁹¹ GAC, “Meeting 23: Luxembourg Communiqué,” July 12, 2005, http://gac.icann.org/system/files/GAC_23_Luxembourg.pdf.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ ICANN, “Special Meeting of the Board,” September 15, 2005, <http://www.icann.org/en/minutes/minutes-15sep05.htm>.

⁹⁶ ICM and ICANN, “.Draft Sponsored TLD Registry Agreement,” August 1, 2005, <http://www.icann.org/en/tlds/agreements/xxx/proposed-xxx-agmt-09aug05.pdf>.

*strong sense of discomfort in the GAC about the TLD, notwithstanding the explanations to date.*⁹⁷

Tarmizi disclosed that he had been “approached by some of the [governments with concerns]” and had “advised them that apart from the advice given in relation to the creation of new gTLDs in the Luxembourg Communiqué that implicitly refers to the proposed TLD, sovereign governments are also free to write directly to ICANN about specific concerns.” In the same letter, Tarmizi also asked the Board to “allow time for additional governmental and public policy concerns to be expressed before reaching a final decision.”⁹⁸

Following this, Michael Gallagher, Assistant Secretary of the US Department of Commerce and Administrator of the NTIA, wrote to Vint Cerf “to urge the Board to ensure that the concerns of all members have been adequately heard and resolved before the Board takes action on [the .xxx] application.”⁹⁹ The ICANN website’s “Correspondence” page¹⁰⁰ currently dates this letter August 15, 2005.¹⁰¹ The posted digital copy of this letter has two date stamps on it: August 11 and “received August 15.”¹⁰² This letter additionally noted that the Department of Commerce had received a large number of negative comments from the public regarding the proposed sTLD.¹⁰³

On August 15, the same day the Gallagher letter was posted to ICANN’s website, ICM officially requested an additional month to allow ICANN to address the concerns raised by the GAC.¹⁰⁴ Consequently, consideration of the proposed agreement was postponed until the September 2005 Board meeting.¹⁰⁵

On September 6, 2005, Marcelo de Carvalho Lopes, the Secretary of Information Technology Policy of Brazil, wrote to Mohamed Sharil Tarmizi and stated that “significant impacts in local concerns have been introduced [as a result of the .xxx proposal] without adequate consultation with national governments.”¹⁰⁶ Lopes also requested that “any new decision concerning the introduction of any other TLDs should only be taken after a careful analysis of the real need for

⁹⁷ Mohamed Sharil Tarmizi to ICANN Board, August 12, 2005, ICANN Correspondence <http://www.icann.org/correspondence/tarmizi-to-board-12aug05.htm>.

⁹⁸ Ibid.

⁹⁹ Michael Gallagher to Vint Cerf, August 15, 2005, ICANN Correspondence, <http://www.icann.org/correspondence/gallagher-to-cerf-15aug05.pdf>.

¹⁰⁰ ICANN, “Correspondence,” <http://www.icann.org/correspondence>.

¹⁰¹ Ibid.

¹⁰² During the Berkman team’s interview process, some interviewees noted there was confusion as to whether the letter was received on August 11 or on August 15, 2005. Compare <http://www.icann.org/correspondence/gallagher-to-cerf-15aug05.pdf> with the Correspondence Page date: <http://www.icann.org/correspondence>.

¹⁰³ Ibid.

¹⁰⁴ Stuart Lawley to Vint Cerf, August 15, 2005, ICANN Correspondence, <http://www.icann.org/correspondence/lawley-to-twomey-15aug05.pdf>. See also ICM, “Request for Independent Review Process,” June 6, 2010, p 34, <http://icann.org/en/irp/icm-v-icann/icm-irp-request-06jun08.pdf>.

¹⁰⁵ Ibid.

¹⁰⁶ Marcelo de Carvalho Lopes to Mohamed Sharil Tarmizi, September 6, 2005, ICANN Correspondence, <http://www.icann.org/correspondence/lopez-to-tarmizi-06sep05.pdf>.

such introduction within the Internet and due consultation” with all affected parties and governments.¹⁰⁷

In a special meeting on September 15, 2005, the Board resolved to continue discussions with ICM and to address “additional provisions or modifications for inclusion” in the agreement “to ensure there are effective provisions requiring development and implementation of policies consistent with the principles in the ICM application.”¹⁰⁸ On September 16, Peter Zangl, Deputy Director of the European Commission’s Information Society, Media Directorate General and a member of the GAC, wrote to Vint Cerf and asked ICANN to allow the GAC to review the independent evaluators’ reports on the sTLD proposals before the Board reached a final decision on .xxx. Zangl also requested that the ICANN Board explain their reasons for accepting the ICM’s application in response to the 2003 RFP round after it was denied in the 2000 “proof of concept” round.¹⁰⁹ A response to this letter was not issued until mid-January 2006.¹¹⁰

Although the proposed .xxx registry agreement was again on the agenda for discussion at the special meeting of the Board held on October 12, 2005, the meeting minutes do not recount any discussion concerning the agreement, ICM, or .xxx.¹¹¹ However, the minutes note that “there was discussion regarding the nature of other matters on the Board’s agenda and the remaining agenda items were put over until the next possible time for the Board to take up such matters.”¹¹² Prior to the end of 2005, the ICANN Board held three more meetings: a special meeting on October 24, a special meeting on November 8, and the Vancouver Meeting in early December.¹¹³ The .xxx sTLD and proposed registry agreement were not listed on the agendas for these meetings nor mentioned in the meeting minutes.

In a letter to Paul Twomey dated November 23, 2005, Jonas Bjelfvenstam, the State Secretary for Communications and Regional Policy in Sweden, expressed the Swedish disapproval for the .xxx domain. Bjelfvenstam almost made the following remarks regarding the GAC’s role in the ICANN decision-making process:

I know that all TLD applications are dealt with in procedures open to everyone for comment. However, in a case like this, where public interests clearly are involved, we feel it could have been appropriate for ICANN to request advice from GAC. Admittedly, GAC could have given advice to ICANN anyway at any point in time of the process and to my knowledge, no GAC members have raised the question before the GAC meeting July 9 - 12,

¹⁰⁷ Ibid.

¹⁰⁸ ICANN, “Special Meeting of the Board,” September 15, 2005, <http://www.icann.org/correspondence/lopez-to-tarmizi-06sep05.pdf>.

¹⁰⁹ Peter Zangl to Vint Cerf, September 16, 2005, ICANN Correspondence, <http://www.icann.org/correspondence/zangl-to-cerf-16sep05.pdf>.

¹¹⁰ Vint Cerf to Peter Zangl, January 30, 2005, ICANN Correspondence, <http://www.icann.org/correspondence/cerf-to-zangl-30jan06.pdf>.

¹¹¹ ICANN, “Special Meeting of the Board,” October 12, 2005, <http://www.icann.org/en/minutes/minutes-12oct05.htm>.

¹¹² Ibid.

¹¹³ See ICANN, “2005 Board Meetings,” 2005, <http://www.icann.org/en/minutes/index-2005.html>.

2005, in Luxembourg. However, we all probably rested assure that ICANN's negative opinion on .xxx, expressed in 2000, would stand.

From the ICANN decision on June 1, 2005, there was too little time for GAC to have an informed discussion on the subject at its Luxembourg summer meeting; one month would be insufficient time for governments to independently consider and respond to the subject matter. In this specific case, several countries raised serious concerns at the GAC meeting. However, there was too little information at hand to have an informed and fruitful discussion and hence no conclusions were reached on the subject.¹¹⁴

The letter requested that the ICANN Board “postpone conclusive discussion on .xxx until after the upcoming GAC meeting in November 29–30, 2005, in Vancouver” so that the GAC could discuss matters. Bjelfvenstam asked the Board to provide “in detail how it means .xxx fulfils the criteria set in advance (‘criteria for Independent Evaluators’).”¹¹⁵

On the same day, November 23, Paul Twomey responded to Bjelfvenstam’s letter.¹¹⁶ In his response, Twomey explained that the ICANN Board had put off “any decision on [the .xxx] application until at least the ICANN Board meeting on 4 December 2005.”¹¹⁷

The GAC’s third and final meeting in 2005 was held over November 28–December 1 in Vancouver, British Columbia. In the GAC’s Vancouver Communiqué, the only relevant note on the .xxx application was the following:

The GAC also welcomed a report from ICANN on the status of Board approval of sponsored TLDs, as well as the Evaluation Report requested by GAC members. In that regard, the GAC welcomed the decision to postpone the Board’s consideration of the .XXX application from its December 4th, 2005 meeting until such time as the GAC has been able to review the Evaluation Report and the additional information requested from ICANN.¹¹⁸

2.4 The Role of the GAC in the .xxx Process: 2006

As of January 1, 2006, the Board had not yet voted on the pending .xxx registry agreement. The next significant events occurred following the GAC’s meeting in Wellington in March. Until then, ICANN continued to negotiate the terms for the proposed .xxx registry agreement while responding to written communication from the members of the community.

¹¹⁴ Jonas Bjelfvenstam to Paul Twomey, November 23, 2005, ICANN Correspondence, <http://www.icann.org/correspondence/bjelfvenstam-to-twomey-23nov05.htm>.

¹¹⁵ Ibid.

¹¹⁶ Paul Twomey to Jonas Bjelfvenstam, November 23, 2005, ICANN Correspondence, <http://www.icann.org/correspondence/twomey-to-bjelfvenstam-23nov05.pdf>.

¹¹⁷ Ibid.

¹¹⁸ GAC, “Communiqué 24—Vancouver,” December 1, 2005, http://gac.icann.org/system/files/GAC_24_Vancouver_Communique.pdf.

On January 17, 2006, Vint Cerf issued a seven-page letter responding to Peter Zangl's September 16, 2005 letter.¹¹⁹ In this letter, Cerf highlighted some of the procedural and substantive differences between the 2000 "proof of concept" round and the 2003 RFP and addressed a number of issues related to the GAC that were raised in Zangl's original letter. Cerf explained that the GAC was first formally informed of the pending sTLD applications in a "1 December 2004 letter from Dr. Twomey" to the GAC which "request[ed] input on the public policy elements of a number of issues and highlighting major developments in ICANN."¹²⁰ Cerf stated that "the Chairman of the GAC responded to Dr. Twomey on 3 April 2005," and "noted [in this letter] that, as of that date, '[n]o GAC members have expressed specific reservations or comments, in the GAC, about the applications for sTLDs in the current round.'"¹²¹ Cerf then noted that "on 1 June 2005, the Board voted to begin discussion of proposed commercial and technical terms with ICM" and that "this decision generated more GAC interest in the application than had been shown earlier."¹²² Cerf also stated that during this time period, Paul Twomey reported to the GAC that "no comments had been received from governments regarding the application" and the GAC had not "raised the issue in any formal comment to ICANN, such as by inclusion in a Communiqué."¹²³ Finally, Cerf pointed out that the next formal correspondence received by ICANN was the August 12, 2005 letter from the GAC Chairman that described the overall discomfort of the GAC.¹²⁴

On February 11, 2006, Paul Twomey sent Mohamed Sharil Tarmizi a letter that was essentially identical in substance to the letter Vint Cerf sent to Peter Zangl on January 17.¹²⁵ In addition to summarizing the Board's interaction with the GAC to date, the Twomey letter also noted that ICANN had "received letters from some members of the Governmental Advisory Committee (GAC) about the . . . application submitted by ICM Registry for .xxx" and summarized the ICM application and the Board's interaction with the GAC since the application was received in 2004.¹²⁶

On March 17, 2006, Peter Zangl replied to Vint Cerf's January 17, 2006 letter.¹²⁷ In his letter, Zangl thanked Cerf for the reply and acknowledged that ICANN is responsible for making the final decision. Zangl also made the following remarks:

¹¹⁹ Vint Cerf to Peter Zangl, January 17, 2006, ICANN Correspondence, <http://www.icann.org/correspondence/cerf-to-zangl-30jan06.pdf>. See also Peter Zangl to Vint Cerf, September 16, 2005, ICANN Correspondence, <http://www.icann.org/en/correspondence/zangl-to-cerf-16sep05.pdf>.

¹²⁰ Ibid., 2. The letter also includes a hyperlink to the Paul Twomey letter sent to Mohamed Sharil Tarmizi on December 1, 2004.

¹²¹ Ibid., 2-3 (some punctuation omitted).

¹²² Ibid., 3.

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ Paul Twomey to Mohamed Sharil Tarmizi, February 11, 2006, ICANN Correspondence, <http://www.icann.org/correspondence/twomey-to-tarmizi-16feb06.pdf>. Cf. Vint Cerf to Peter Zangl, January 17, 2006, <http://www.icann.org/en/correspondence/cerf-to-zangl-30jan06.pdf>.

¹²⁶ Ibid.

¹²⁷ Peter Zangl to Vinton Cerf, March 17, 2006, ICANN Correspondence, <http://www.icann.org/en/correspondence/zangl-to-cerf-17mar06.pdf>. See also Vint Cerf, to Peter Zangl, January 17, 2006, <http://www.icann.org/en/correspondence/cerf-to-zangl-30jan06.pdf>.

I would emphasize however that the request for additional information made by the GAC in Vancouver results from the conclusion of the evaluation team that a number of the applications, including .xxx ‘do not meet all of the selection criteria’ and that, moreover, their ‘deficiencies cannot be remedied within the applicant’s proposed framework’. Importantly, the evaluators ‘recommend that ICANN not consider these applications further’.

In order to carry about our duties effectively in the GAC therefore, you will understand why it would be useful to know why the Board decided to proceed with the application, in particular given such explicit advice from the evaluators. I note and appreciate the extensive information you have provided in your letter about the Board’s deliberations, but I do not feel that this specific question is succinctly addressed. I would be grateful therefore if there is additional information that you, on behalf of the Board, can share with us on these issues.

On March 20, 2006, John M. R. Kneuer, the Acting Assistant Secretary at the US Department of Commerce and Acting Assistant Secretary for the NTIA, wrote to Mohamed Sharil Tarmizi.¹²⁸ His letter advised the GAC that the proposed .xxx registry agreement did not reflect a number of key commitments offered by ICM within the contract’s provisions and requested that the GAC bring this to the attention of the ICANN Board prior to the Wellington, New Zealand meeting.¹²⁹ The letter also included a description of the provisions that the NTIA said were not reflected in the agreement.¹³⁰

On March 25, 2006, Stuart Lawley, ICM’s CEO, sent a letter to Tarmizi responding to the comments made by the NTIA on March 20.¹³¹ In this letter, Lawley stated that the letter from the NTIA was incorrect and argued that the issues raised by the NTIA were already addressed by a number of specific commitments that had been negotiated between ICANN and ICM.¹³²

A few days after the exchange of letters, the GAC met in Wellington, New Zealand.¹³³ The Wellington Communiqué expressed the most critical remarks with regard to the .xxx application to date by the GAC. In particular, the Communiqué stated that “the GAC does not believe the February 11 letter provides sufficient detail regarding the rationale for the Board determination that the application had overcome the deficiencies noted in the Examination Report.”¹³⁴ The Communiqué further requested “a written explanation of the Board decision, particularly with regard to the sponsored community and public interest criteria outlined in the sponsored top-

¹²⁸ John M. R. Kneuer to Mohamed Sharil Tarmizi, March 20, 2006, ICANN Correspondence, <http://www.icann.org/correspondence/kneuer-to-tarmizi-20mar06.pdf>.

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ Stuart Lawley to Mohamed Sharil Tarmizi, March 25, 2006, ICANN Correspondence, <http://www.icann.org/correspondence/lawley-to-tarmizi-25mar06.pdf>.

¹³² Ibid.

¹³³ GAC, “Communiqué 25—Wellington,” March 28, 2006, http://gac.icann.org/system/files/GAC_25_Wellington_Communique.pdf.

¹³⁴ Ibid., 3. See also Paul Twomey to Mohamed Sharil Tarmizi, February 16, 2006, ICANN Correspondence, <http://www.icann.org/en/correspondence/twomey-to-tarmizi-16feb06.pdf>.

level domain selection criteria.”¹³⁵ The Communiqué also stated that ICM committed to “a range of public interest benefits as part of the bid to operate the .xxx domain” and that “these undertakings have not yet been included as ICM obligations in the proposed .xxx Registry Agreement.” It also listed a number of such provisions that the GAC wanted to be addressed.¹³⁶

In a separate section of the Wellington Communiqué, titled “GAC–ICANN Board Cooperation,” the Communiqué noted that “the GAC acknowledges that there is a need for the GAC to consider changes in its working methods in order to enable it to interact more routinely with the ICANN Board and the community.”¹³⁷

The day after the GAC Communiqué was issued, the ICANN Board held its regular meeting in Wellington.¹³⁸ At this meeting, the Board resolved that “the President and the General Counsel are directed to analyze all publicly received inputs” and “to continue negotiations with [ICM].”¹³⁹ The resolution stated that the President and General Counsel also are “to ensure that the TLD sponsor will have in place adequate mechanisms to address any potential registrant violations of the sponsor’s policies,” evaluate the proposed amendments to the registry agreement and provide the Board with recommendations.¹⁴⁰

On April 28, 2006, the ICANN Board held a special meeting and discussed, among other things, the status of the proposed .xxx sTLD registry agreement.¹⁴¹ John Jeffrey, the ICANN General Counsel, provided an update on the negotiations and the changes that had been made to the proposed registry agreement since the Wellington meetings. Jeffrey noted that ICM had provided “a final version of their proposal for a response to all concerns from the community and relating to the GAC Communiqué.”¹⁴² Vint Cerf indicated that he would like to “have an up or down vote at the 10 May Meeting.”¹⁴³ John Jeffrey also stated that that “the ICM version [of the proposed agreement], including a letter from ICM, would be published later that day for public comment.”¹⁴⁴

Mohamed Sharil Tarmizi, who was present at this Board meeting, “requested an update on whether there would be a response to the GAC regarding the items that set out in the Communiqué in Wellington.” Paul Twomey stated that “a response would be provided before the 10 May Meeting.”¹⁴⁵ Over the remainder of the Board meeting, the minutes indicate the Board members discussed concerns regarding the proposed registry agreement, including the manner

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Ibid., 2-3.

¹³⁸ ICANN, “Meeting of the Board, Wellington, NZ,” March 31, 2006, <http://www.icann.org/en/minutes/minutes-31mar06.htm>.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ ICANN, “Special Meeting of the ICANN Board,” 18 April, 2006, <http://www.icann.org/en/minutes/minutes-18apr06.htm>.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

of compliance and whether policy enforcement provisions would be sufficient to cover a community “as complex as the adult entertainment community.”¹⁴⁶

Paul Twomey sent a letter addressed to Tarmizi and members of the GAC on May 4, 2006.¹⁴⁷ The letter stated that Twomey was writing in response to the GAC’s request for information regarding the decision to proceed with the .xxx negotiations in June 2005. In this letter the ICANN Board again directed the GAC to the “11 February letter to explain ‘the Board decision, particularly with regard to the sponsored community and public interest criteria.’”¹⁴⁸ The letter further stated that “it is important to note that the Board decision as to the .xxx application is still pending” and that the June 2005 decision only permitted the ICANN staff to enter into negotiations for a proposed registry agreement. Twomey explained that this decision did not prejudice “the Board’s right to evaluate the resulting contract and to decide whether it meets all of the criteria before the Board including public policy advice such as the Board either approves or rejects the registry agreement relating to the .xxx application.”¹⁴⁹ The remainder of the letter explained the process of evaluation again as explained in the February 11 letter and, in particular, noted that “in all instances where the evaluators’ negative reports were reevaluated by the Board of Directors, the applicants answered all questions and clarified issues that had been of concern to the evaluators to the satisfaction of a majority of the Board.”¹⁵⁰

On May 9, 2006, Martin Boyle, the UK Representative to the GAC, sent a letter to Vint Cerf as a follow-up to the discussions held at the Wellington meeting.¹⁵¹ The letter describes the “firm view [of the UK] that if the dot.xxx domain name is to be authorized, it would be important that ICANN ensures the benefits and safeguards proposed by the registry, ICM, including the monitoring all dot.xxx content and rating of content on all servers pointed to by dot.xxx, are genuinely achieved from day one.”¹⁵² Boyle also pointed out that “it will be important for the integrity of ICANN’s position as final approving authority. . . to be seen as able to intervene promptly and effectively if for any reason failure on the part of ICM in any of these fundamental safeguards.”¹⁵³

Also on May 9, 2006, Tim Ruiz, Vice President of GoDaddy, sent a letter to ICANN to “encourage the ICANN Board to consider the proposed .xxx Registry Agreement only in regards to how it addresses the public policy concerns raised by the GAC.”¹⁵⁴ Ruiz also stated that the current

¹⁴⁶ Ibid.

¹⁴⁷ John Jeffrey to Mohamed Sharil Tarmizi and members of the GAC, May 4, 2006, ICANN Correspondence, <http://icann.org/correspondence/twomey-to-tarmizi-04may06.pdf>. See also Paul Twomey to Mohamed Sharil Tarmizi, February 11, 2006, <http://icann.org/en/correspondence/twomey-to-tarmizi-16feb06.pdf>.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ Martin Boyle to Vint Cerf, May 9, 2010, ICANN Correspondence, <http://www.icann.org/correspondence/boyle-to-cerf-09may06.htm>.

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ Tim Ruiz to ICANN, May 9, 2010, ICANN Correspondence, <http://www.icann.org/correspondence/ruiz-to-board-09may06.pdf>.

round of TLD expansion was still not complete after two years and notes that “this fact will certainly discourage future applicants for new sponsored or un-sponsored gTLDs.”¹⁵⁵

On May 10, 2006, the Board held a special meeting and voted on the proposed .xxx registry agreement, following a “detailed discussion” of the agreement terms, including the promises made by ICM in support of the proposal, concerns regarding ICANN’s ability to enforce the terms through a contractual framework, the sponsorship criteria, GAC advice and community input.¹⁵⁶ By a 9–5 vote, the ICANN Board resolved to reject the current draft of the .xxx registry agreement (but not ICM’s application as a whole), citing concerns about the agreement’s enforceability, the sponsorship criteria, and other concerns voiced in the public comments received.¹⁵⁷ ICM filed a Request for Reconsideration on the same day;¹⁵⁸ however, after ICANN invited ICM to submit a revised draft of the registry agreement, ICM withdrew its Request.¹⁵⁹

Stuart Lawley, President of ICM, sent a letter to Vint Cerf on May 30, 2006 expressing his disappointment at the Board’s decision and at “the lack of communication from ICANN” on the current status of the application. Lawley noted that after reviewing the Board’s voting transcript he was “convinced” that “certain misconceptions prevented the Board from reaching a balanced and equitable judgment on the agreement.” In particular, Lawley described the May 9 letter from Martin Boyle, the UK GAC representative, as being “mischaracterized.” Lawley also stated that ICM was still committed to the project and had filed an expedited request for reconsideration. Finally, Lawley outlined an ICM initiative that “enable[s] certain responsible members of the online adult entertainment community . . . to submit a request to reserve a particular domain for their subsequent registration should ICANN authorize ICM to operate .XXX”¹⁶⁰

Between June 2006 and January 1, 2007, ICANN has no public records of GAC correspondence regarding the proposed .xxx registry agreement or the sTLD application. Additionally, the .xxx proposed registry agreement was not mentioned in any Board meeting minutes during this time period.

2.5 The Role of the GAC in the .xxx Process: 2007

On January 5, 2007, ICANN posted a “revised proposed” .xxx registry agreement between ICANN and ICM for public comments until February 5, 2007.¹⁶¹ On February 2, 2007, Tarmizi sent a letter to Vint Cerf in response to the January 5 announcement.¹⁶²

¹⁵⁵ Ibid.

¹⁵⁶ ICANN, “Special Meeting of the Board,” May 10, 2006, <http://www.icann.org/en/minutes/minutes-10may06.htm>.

¹⁵⁷ ICANN, “Voting Transcript of Board Meeting,” May 10, 2006, <http://www.icann.org/en/minutes/voting-transcript-10may06.htm>.

¹⁵⁸ ICM, “Request for Reconsideration of Board Action,” May 10, 2006, <http://www.icann.org/en/committees/reconsideration/icm-06-4/petition-20may06.pdf>.

¹⁵⁹ ICM, “Request for Reconsideration 06-4: Letter from J. Beckwith Burr to Reconsideration Committee,” October 29, 2006, <http://www.icann.org/en/committees/reconsideration/withdrawal-of-request-06-4-29oct06.htm>.

¹⁶⁰ Stewart Lawley to Vint Cerf, May 30, 2006, ICANN Correspondence, <http://www.icann.org/en/correspondence/lawley-to-cerf-30may06.htm>.

¹⁶¹ ICANN Announcement, “ICANN Publishes Revised Proposed Agreement on .XXX,” January 5, 2007, <http://www.icann.org/en/announcements/announcement-05jan07.htm>.

The letter stated that the “GAC convened a teleconference on 17 January 2007 to discuss its reaction to [the call for comments]” and that the participating GAC members on the call “noted that the modifications to the proposed agreement are intended to address public policy issues raised by the GAC in its Wellington, New Zealand Communiqué of March 2006.” The letter also pointed out that “it is unlikely that the GAC will be in a position to provide any comments on .xxx, above and beyond that provided in the Wellington Communiqué, before the next meeting in Lisbon.”¹⁶³

The letter also stated that, despite the ICANN President’s letters sent on February 11 and May 4, 2006, the GAC had requested “written clarification from the ICANN Board regarding its decision June 1 2005” and “reiterate[s] the GAC’s request for a clear explanation of why the ICANN Board is satisfied that the .xxx application has overcome the deficiencies relating to the proposed sponsorship community.”¹⁶⁴ The letter also requested that ICANN provide the GAC with confirmation that the proposed .xxx registry agreement contained enforceable provisions covering “all of ICM Registry’s commitments.”

Finally, Tarmizi’s letter suggested that it would be appropriate for the GAC and the ICANN Board to hold “face-to-face discussions” in Lisbon in March 2007. In his concluding remarks, Tarmizi again stated that several GAC members remained “emphatically opposed from the public policy perspective to the introduction of an .xxx sTLD”—as was noted in the Wellington Communiqué—and that such sentiments were not contingent on the “specificities of the agreement.”¹⁶⁵

Two special meetings of the ICANN Board were held between February 5, 2007 and the March 2007 Lisbon meetings. The first meeting, held on February 12, 2007, included a lengthy discussion of the proposed .xxx agreement, which covered community and public comments, status of advice from the GAC, including a “clarification of the letter from the GAC Chair and Chair-Elect” and whether additional public policy advice was to be expected, and how ICM measures up to the RFP criteria.¹⁶⁶

Some of the notable points raised during this meeting were that more than 200,000 emails had been sent to ICANN and more than 1,300 comments had been submitted to the public comment forums since the initial ICM application. Of these, 600 comments and 55,579 emails had been received since the January 5, 2007 posting of the proposed registry agreement. The Board also discussed the extent of the burden being placed on ICM to show that the entire sponsoring community supports the creation of the .xxx domain. Some Board members raised what they described as a recent lack of support for the defined community observed in negative emails and public comments. Ultimately, the Board resolved that “a majority of the Board has serious concerns” about the underlying sponsored community support, and that ICM should provide

¹⁶² Mohamed Sharil Tarmizi to Vint Cerf, February 2, 2007, ICANN Correspondence, <http://www.icann.org/en/correspondence/tarmizi-to-cerf-02feb07.pdf>.

¹⁶³ Ibid.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ ICANN, “Special Meeting of the Board,” February 12, 2007, <http://www.icann.org/en/minutes/minutes-12feb07.htm>.

further information to ICANN to help determine whether the sponsorship criteria had been met. Tarmizi stated during this meeting that the February 2, 2007 letter sent to Vint Cerf served as the GAC's official advice on the current proposed registry agreement.

ICM responded on March 8, 2007 to the Board's request for information and provided a list of "pre-reservants" compiled from the last six months.¹⁶⁷ This list was generated through ICM's "pre-reservation" initiative, which Stuart Lawley had discussed in his May 30, 2006 letter to Vint Cerf.¹⁶⁸ Attached to the letter were over 75,000 pre-reservations of domain name strings specifically requested by webmasters, totaling 546 pages. A number of statistics in favor of community sponsorship were also noted in this letter.

The Board held its next special meeting on March 12, 2007. At this meeting, the Board engaged in another lengthy discussion concerning the proposed .xxx registry agreement and whether the sponsorship criteria had been met. The Board meeting minutes noted that most members felt the Board should hold off voting on the application until, or after, the Lisbon meeting, which was two weeks away. The minutes also indicated that, again, Tarmizi noted that the Board could seek "additional advice from the GAC" prior to the Lisbon meetings, but such a request would need to be made "expeditiously." Tarmizi also noted that some GAC members remained adamantly against the creation of the .xxx sTLD.¹⁶⁹

The GAC representatives at this meeting (Tarmizi and Janis Karklins) asked if a response to the GAC's request for more information on the Board's June 2005 decision would be provided prior to the Lisbon meetings. In response, "the Chairman said that a response would be provided"; the minutes stated that "this was confirmed by Paul Twomey," who pointed out that some previous letters were responsive to the GAC's requests and some "additional clarity around the GAC's advice could be presented on this matter."¹⁷⁰

The GAC request was answered on March 14, 2007, in a one-page letter from Vint Cerf.¹⁷¹ Cerf again noted that the communications from ICANN on February 11 and May 4, 2006 contained the information the GAC requested. Cerf also stated that the Board was "still reviewing the materials and ha[d] not made a determination as to whether the revisions to the ICM Registry contract contain the necessary enforceable provisions." Cerf acknowledged that some members of the GAC were opposed to the creation of the .xxx sTLD and that they had requested that the final decision be delayed until the Lisbon meetings.

¹⁶⁷ Stuart Lawley to Vint Cerf and ICANN Board, March 8, 2007, ICANN Correspondence, <http://www.icann.org/correspondence/cover-letter-pre-reservation-aatt.pdf>.

¹⁶⁸ Stuart Lawley to Vint Cerf, May 30, 2006, ICANN Correspondence, <http://www.icann.org/en/correspondence/lawley-to-cerf-30may06.pdf>.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ Vint Cerf to Mohamed Sharil Tarmizi, March 14, 2007, ICANN Correspondence, <http://www.icann.org/correspondence/cerf-to-tarmizi-karklins-14Mar07.pdf>.

The GAC Lisbon meetings were held in late March. The Lisbon Communiqué was issued on March 28, 2007.¹⁷² With regard to .xxx, the Lisbon Communiqué remarked that the “Wellington Communiqué remains a valid and important expression of the GAC’s views on .xxx” and that the GAC “does not consider the information provided by the Board to have answered the GAC concerns as to whether the ICM application meets the sponsorship criteria.”¹⁷³

The Communiqué also brings attention to the Canadian government’s comments, which had been posted to the ICANN public forums. These comments raised concerns that ICANN was moving towards an “ongoing management and oversight role regarding Internet content, which would be inconsistent with its technical mandate.”¹⁷⁴

Following the GAC meetings in Lisbon, the ICANN Board also held a meeting on March 30, 2007.¹⁷⁵ During this meeting, the Board determined that the ICM application failed to meet the sponsored community criteria in the RFP specification and, based on the extensive public policy issues raised in the GAC Communiqués, it would not be appropriate for the Board to approve the ICM application or the revised agreement. Consequently, the Board voted to reject the ICM application in its entirety.

2.6 Perceptions of the GAC’s Role in the .xxx Process Based on Berkman Case Study Interviews

Individuals who have been interviewed in the course of developing this case study shared different observations regarding the interaction between the GAC and the ICANN Board during the evaluation of the .xxx application. Some interviewees suggested a clash of institutional cultures that inhibited better communication. Others cited a lack of appreciation on the part of the ICANN Board for the role of the GAC and the difficult political challenges faced by an inter-governmental body, all with domestic constituencies to which they must answer. Other observers indicated that the schedule of the policy-making process did not allow sufficient time for GAC to offer advice to the ICANN Board. Some of those interviewees described a lack of clarity regarding what constituted GAC advice to the ICANN Board. Others suggested that the GAC did not offer timely advice on the .xxx decision because members believed that the case was closed.¹⁷⁶

¹⁷² GAC, “Communiqué 28—Lisbon,” March 28, 2007, 4, http://gac.icann.org/system/files/GAC_28_Lisbon_Communique.pdf.

¹⁷³ Ibid.

¹⁷⁴ Ibid. at 5.

¹⁷⁵ ICANN, “Meeting of the ICANN Board, Lisbon,” March 28, 2007, http://www.icann.org/en/minutes/resolutions-30mar07.htm#_Toc36876524.

¹⁷⁶ Interviews, September and October 2010.

3 The Independent Review Panel: ICM v. ICANN

3.1 Independent Review Requests and the Independent Review Panel in ICANN's Bylaws

The Independent Review Panel (IRP) is one of three existing mechanisms purposed for the review of ICANN Board activities and decisions (the other two mechanisms are the Ombudsman and Reconsideration Requests). Article IV, Section 3 of the ICANN Bylaws states that, “any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review.”¹⁷⁷ Once submitted, a request for independent review is “referred to an Independent Review Panel (IRP)” which compares the “contested actions of the Board to the Articles of Incorporation and Bylaws” and ultimately declares “whether the Board has acted consistently with” the provisions contained therein.¹⁷⁸

At the request of either disputing party, the request for independent review can be heard by a three-member panel of arbiters; however, if the parties do not opt for a three-member panel, the request is considered by a one-member panel.¹⁷⁹ In either case, the panel that considers the request for independent review has the power to:

- a) request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties;
- b) declare that an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and
- c) recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon opinion of the IRP.¹⁸⁰

The IRP makes “its final declaration based solely on the documentation, supporting materials, and arguments submitted by the parties” and “specifically designate[s] a prevailing party.”¹⁸¹ The “party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider,” and “each party shall bear its own expenses.”¹⁸²

To date, ICM v. ICANN is the only request for independent review that has been heard by an IRP on the merits.¹⁸³ In this case, the IRP consisted of a three-member panel of arbitrators contracted

¹⁷⁷ ICANN Bylaws, Article IV, Section 3(2), August 5, 2010, <http://icann.org/en/general/bylaws.htm>.

¹⁷⁸ Ibid., Article IV, Section 3. As a side note, use of the term “IRP” appears to be used differently in documents and either refers to the “Independent Review Process” or the “Independent Review Panel.” Except where otherwise noted, this report intends the term IRP to refer to the Independent Review Panel.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid., Article IV, Section 3(8).

¹⁸¹ Ibid., Article IV, Section 3(12).

¹⁸² Ibid., Article IV, Section 3(12).

¹⁸³ See ICANN, “IRP,” <http://www.icann.org/en/irp>

by the International Centre for Dispute Resolution.¹⁸⁴ The panel included Judge Stephen M. Schwebel, Jan Paulson, and Judge Dickran Tevrizian.¹⁸⁵

3.2 ICM's Request for Independent Review

On June 6, 2008, ICM submitted a request for independent review, alleging that ICANN acted in a manner “inconsistent with its Articles of Incorporation and Bylaws” by improperly administering the 2003 RFP and rejecting ICM’s .xxx application in March 2007.¹⁸⁶ ICM requested for the IRP to declare that: (1) ICANN’s March 2007 rejection of the ICM application was inconsistent with the ICANN Bylaws and Articles of Incorporation, (2) ICANN “must immediately execute a registry agreement on terms and conditions substantially similar to ICM’s draft registry agreement posted on ICANN’s website on February 6, 2007,” and (3) the IRP’s “determination regarding whether any of ICANN’s actions were inconsistent with ICANN’s Articles of Incorporation and Bylaws is *binding* on ICANN.”¹⁸⁷

In support of these allegations, ICM argued that several events throughout ICANN’s evaluation of the .xxx application were inconsistent with the Articles of Incorporation and Bylaws. Additionally, ICM argued that the five reasons ICANN gave in support of its rejection were inconsistent with the Articles of Incorporation, Bylaws, and the way the other applicants were treated.¹⁸⁸

Primarily, ICM argued that the June 1, 2005 Board decision constituted an approval of the ICM proposal in light of the RFP criteria, including the sponsorship criteria.¹⁸⁹ ICM argued that ICANN had used a “two-step” process with the other applicants, whereby applicants were first approved on the merits of the RFP criteria, “followed by registry agreement negotiation” and execution.¹⁹⁰ According to ICM, the .xxx application was the only application that deviated from this process by reopening the sponsorship criteria.¹⁹¹ ICM also stated that there was a lack of “evidence before the Board that ICM’s support in the community was eroding.”¹⁹² Ultimately, ICM claimed that “ICANNs reopening of the sponsorship criteria—which it did only to ICM—was unfair, discriminatory, and pretextual, and a departure from transparent, fair, and well documented policies.”

¹⁸⁴ See ICANN, “Resolutions Adopted at Special ICANN Board Meeting” Special Meeting of the Board via Telephone 19 April 2004 <http://www.icann.org/en/minutes/resolutions-19apr04.htm>, when the ICANN Board designated the International Centre for Dispute Resolution as the Independent Review Provider..

¹⁸⁵ Declaration of the Independent Review Panel, ICDR. Case No. 50 117 T 00224 08, (February 19, 2010) (hereinafter referred to as the “IRP Declaration”), available at <http://www.icann.org/en/irp/icm-v-icann/irp-panel-declaration-19feb10-en.pdf>.

¹⁸⁶ ICM, “Request for Independent Review Process,” June 8, 2008, <http://icann.org/en/irp/icm-v-icann/icm-irp-request-06jun08.pdf>.

¹⁸⁷ *Ibid.*, 1-2 (emphasis added).

¹⁸⁸ IRP Declaration, 45.

¹⁸⁹ *Ibid.* See also ICM, “Request for Independent Review Process.”

¹⁹⁰ ICM, “Request for Independent Review Process,” 25-26.

¹⁹¹ *Ibid.*

¹⁹² IRP Declaration, 45.

The IRP request also claimed that the independent evaluations identified greater deficiencies in other sTLD applications (including .jobs and .mobi) and accepted those proposals with comparatively little resistance from ICANN.¹⁹³ For example, ICM stated that “following the negotiations, the proposed .travel and .jobs registry agreements were posted on the ICANN website on 24 March 2005, and were approved two weeks later, on 8 April 2005.”¹⁹⁴ According to the IRP request, “the process for each application still followed the original two-step process of criteria approval followed by registry agreement negotiation” and in “no case other than with the .xxx application” did the Board later reverse its decision after it had voted in favor of negotiations.¹⁹⁵

As additional evidence, ICM claimed “several ICANN senior officials and Board members,” including Vint Cerf, Kurt Pritz, and Joichi Ito made comments that reflected that the June 1, 2005 decision was a determination that ICM had satisfied the RFP criteria.¹⁹⁶ In particular, ICM claimed that Cerf had “informed the GAC that ICM’s application had satisfied the selection criteria” at the July 2005 ICANN meeting in Luxembourg.¹⁹⁷

Finally, the IRP request pointed out that “the GAC was invited to and was often represented at meeting in which ICM’s application (and others) were discussed and debated” and furthermore “[the GAC] was regularly provided with briefing papers regarding the sTLD RFP process, and it was permitted to participate in the Board’s discussions regarding ICM’s application.”¹⁹⁸ The core of this argument focuses on the lack of “any objects to the .xxx sTLD . . . at the outset, when the sTLD evaluation criteria were debated and ultimately approved” and when “ICANN resolved to commence registry agreement negotiations with ICM.”¹⁹⁹ ICM alleged in the IRP Request that the GAC raised no objections to the creation of .xxx and that it was only after the United States Department of Commerce began voicing its concerns in March 2006 that the GAC began to take a dissenting view, expressed mainly in its correspondence with ICANN and in the Wellington and Lisbon Communiqués.²⁰⁰

The IRP request also referenced statements from ICANN Board members who raised doubts about the decision on March 30, 2007 to reject ICM’s proposal. Peter Dengate Thrush was quoted as saying that ICANN’s argument that .xxx does not represent a “sponsored community” was “particularly thin,” and that “if ICANN is going to raise this kind of objection, then it better think seriously about getting out of the business of introducing new TLDs.”²⁰¹ Similarly, Susan Crawford argued that if no consensus existed against the .xxx TLD in the adult community,

¹⁹³ Ibid., 25.

¹⁹⁴ Ibid.

¹⁹⁵ Ibid., 25-26.

¹⁹⁶ Ibid., 29.

¹⁹⁷ Ibid., 29.

¹⁹⁸ Ibid., 30.

¹⁹⁹ Ibid., 31.

²⁰⁰ Ibid., 37.

²⁰¹ Ibid., 46.

then, “given our mandate to create TLD competition, we have no authority to block the addition of this TLD to the root.”²⁰²

ICM also argued that ICANN had never precisely identified what “public policy” issues were raised by the ICM agreement that would warrant the rejection of the application in its entirety.²⁰³ In particular, ICM claimed that ICANN’s interpretation of the Wellington Communiqué and governmental correspondence, which had asserted that ICM was to take responsibility for “enforcing the world’s various and different laws concerning pornography” was “sufficiently absurd as to have been made in bad faith” and discriminatory.²⁰⁴

Among the remaining arguments, ICM also contended that its proposed registry agreement contained sufficient provisions to address child pornography issues and detailed mechanisms that would permit the identification and filtration of illegal or offensive content. Moreover, ICM claimed that ICANN’s view that the ICM proposal raised “significant law enforcement compliance issues” indicated that the “GAC was requiring ICM to enforce local restrictions on access to illegal and offensive content and if [ICM] proved unable to, ICANN would have to do so.” According to ICM, the GAC’s advice required ICANN to impose responsibilities on ICM that were inconsistent with ICANN’s technical mandate.

3.3 ICANN’s Response to ICM’s Request for Independent Review

ICANN filed its “Response to ICM’s Request for Independent Review” on September 8, 2008.²⁰⁵ In response to ICM’s allegations of inconsistency, ICANN argued that: (1) ICANN’s consideration of the ICM proposal was “*more* open and transparent than one would find in virtually any other context in conjunction with any other organization”; (2) the June 1, 2005 decision to enter into negotiations did not bind ICANN to award ICM a registry agreement and retained the ability to reject ICM’s application; and (3) ICANN could have rejected the application solely based on the recommendations from the Independent Evaluation Panel, but instead attempted to work “closely and in good faith with ICM to cure apparent problems with the application and ultimately decided such problems could not be addressed by the agreement.”²⁰⁶

Additionally, ICANN argued that the “Bylaws support a deferential standard of review” to be applied in the Independent Review Process, “particularly with respect to ICM’s claims.”²⁰⁷ On this point, ICANN argued that “as long as the Board’s discussions are open and transparent, its

²⁰² Ibid., 47.

²⁰³ Ibid., 46.

²⁰⁴ Ibid.

²⁰⁵ ICANN, “ICANN’s Response to ICM’s IRP Request,” September, 8, 2008, <http://www.icann.org/en/irp/icm-v-icann/icann-response-to-icm-request-08sep08.pdf>.

²⁰⁶ Ibid., 3-4.

²⁰⁷ Ibid., 4.

decisions are made in good faith, and the relevant parties have been given an opportunity to be heard, there is a strong presumption that the Board's decisions are appropriate."²⁰⁸

In support of these arguments, ICANN included an explanation of its "decision-making processes" and "process for independent review" within its response.²⁰⁹ In this section, ICANN argued that "the Independent Review Process is not a form of traditional dispute resolution, i.e., mediation or arbitration," and described the Independent Review Process as a mechanism "intended to provide the community with a formal process for reviewing specific decisions of the ICANN Board." ICANN pointed to Article IV, Section 3(15) of its Bylaws and claimed that the "IRP's declaration is not binding on the parties" and "the Board, 'where feasible,'" is only required to "consider the IRP's declaration at the Board's next meeting."²¹⁰ ICANN also pointed out that "the Bylaws expressly provide that the Independent Review should be conducted via 'email and otherwise via the Internet to the maximum extent feasible.'" On this point, ICANN argued that "the Independent Review Process does not specifically contemplate the need for a live hearing."²¹¹

ICANN's central factual contention was that its initial approval of the ICM proposal in 2005 and the subsequent contract negotiations were tentative and did not constitute a commitment to award a registry agreement. ICANN argued that its negotiations with ICM were intended to determine whether the terms of a registry agreement could satisfy the ICANN Board's concerns about the proposal's compliance with the sTLD sponsorship criteria. "The entire premise of ICM's request—that proceeding to contract negotiations amounted to a guarantee that ICM would obtain a contract for the .XXX TLD—is simply false."²¹²

ICANN argued further that its final rejection of ICM's proposal in 2007 "came after extensive review, analysis and debate among ICANN Board members" and was not a sign of capriciousness in its decision-making processes. Instead, ICANN argued its decision reflected the following reasons:

- a) ICM's application and revised agreement failed to meet, among other things, the "sponsored community" requirement of the RFP specification;
- b) [The Board's decision was based] on the extensive public comment and the GAC's Communiqués, the agreement raised considerable public policy issues/concerns. The application and agreement did not resolve the issues raised by the GAC's Communiqués, and the Board did not believe the public policy concerns could be credibly resolved with the mechanisms proposed by ICM;
- c) The application raised significant law enforcement compliance issues because of countries' varying laws relating to content and practices that define the nature of the application; and

²⁰⁸ Ibid.

²⁰⁹ Ibid., 5.

²¹⁰ Ibid., 9.

²¹¹ Ibid., 9.

²¹² Ibid., 4.

- d) The Board agreed with the GAC's Lisbon Communiqué, that under the revised agreement, there are credible scenarios that lead to circumstances in which ICANN would be forced to assume an ongoing management and oversight role regarding content on the Internet, which is inconsistent with its technical mandate.²¹³

ICANN requested that the IRP declare that the ICANN Board's decisions, "absent a showing of bad faith," are entitled to deference from ICM and the IRP.²¹⁴ Additionally, ICANN argued that, contrary to ICM's claims, it acted in full accord with its Bylaws and its Articles of Incorporation.²¹⁵

3.4 Establishing the IRP Process

The IRP process is governed by the International Arbitration Rules of the American Arbitration Association's International Centre for Dispute Resolution (ICDR) with supplementary procedural modifications specifically tailored to ICANN.²¹⁶ The ICANN Bylaws offer the IRP provider, ICDR, considerable latitude to "establish operating rules and procedures." In terms of the procedural aspects of the Independent Review, the ICANN Bylaws state the following:

*In order to keep the costs and burdens of independent review as low as possible, the IRP should conduct its proceedings by e-mail and otherwise via the Internet to the maximum extent feasible. Where necessary, the IRP may hold meetings by telephone.*²¹⁷

In its "Response to ICM's Request for Independent Review," ICANN argued that this provision indicated that the "Independent Review Process does not specifically contemplate the need for a live hearing."²¹⁸ Additionally, ICANN argued that this provision also provided the option for a quick, low cost review, conducted over telephone and email.

The Berkman team was unable to locate an official document on record in which the IRP, ICM, or ICANN acknowledge a resolution to these questions raised by ICANN. However, according to interviewees, the IRP apparently determined in an unpublished decision that although the Bylaws and Supplementary Procedures encourage conducting the Independent Review quickly over telephone, Internet, and other electronic means, the procedures give the ICDR panelists clear discretion to hold live hearings.²¹⁹ Indeed, what followed was a twenty-month full arbitration process with full documentation, witness testimony, expert opinion and cross-examination.

²¹³ Ibid., 38–39.

²¹⁴ Ibid., 39 ff.

²¹⁵ Ibid., 43 ff.

²¹⁶ ICDR, "Supplementary Procedures for ICANN Independent Review Process," <http://www.adr.org/sp.asp?id=32197>.

²¹⁷ ICANN Bylaws, Article IV, Section 3(10), August 5, 2010, <http://icann.org/en/general/bylaws.htm>.

²¹⁸ ICANN, "ICANN's Response to ICM's IRP Request," September 8, 2008, <http://www.icann.org/en/irp/icm-v-icann/icann-reponse-to-icm-request-08sep08.pdf>.

²¹⁹ Interviews, September and October 2010.

3.5 *Memorial on the Merits, Witness Statements, and Expert Reports*

On January 22, 2008, ICM filed its memorial on the merits, outlining ICANN's organizational history and its successive calls for proposals for new TLDs. ICM reaffirmed its argument that ICANN had violated its Articles of Incorporation and its Bylaws and that ICANN's actions were inconsistent with "relevant principles of International Law" and "relevant principles of California law."²²⁰ ICM also submitted testimony from Stuart Lawley (Chairman and President of ICM), J. Beckwith ("Becky") Burr (former advisor to the FTC, former advisor to the NTIA, and legal counsel to ICM in connection with its 2004 sTLD submission), Elizabeth Williams (consultant to ICANN during its solicitations for TLD proposals), Milton Mueller (professor at the Syracuse University School of Information Studies), and Jack Goldsmith (professor at Harvard Law School).²²¹

In its response to ICM's memorial on the merits, ICANN argued that ICM had mischaracterized the laws applying to the IRP proceedings, that ICM's factual claims were incorrect, and that ICANN had acted in complete accord with its Articles of Incorporation and its Bylaws.²²² ICANN also submitted testimony from Vint Cerf (then-VP at Google, former Chairman of the Board at ICANN), Paul Twomey (then-CEO and President of ICANN, former Chairman of the GAC), Alejandro Pisanty (former Board member of ICANN), and David Caron (professor of law at UC Berkeley, arbitrator).²²³

3.6 *The IRP's Declaration*

On February 19, 2010, the IRP decided 2–1 in favor of ICM.²²⁴ Three key holdings came from this decision. First, the panel determined that the holdings of the IRP are advisory in nature and do not constitute binding arbitral awards.²²⁵ Second, the panel determined that "the actions and decisions of the ICANN Board are not entitled to deference whether by application of the 'business judgment rule' or otherwise; they are to be appraised not deferentially but objectively."²²⁶ Finally, the IRP also determined that "the Board of ICANN in adopting its resolutions of June 1, 2005, found that the application of ICM Registry for the .xxx TLD met the required sponsorship criteria."²²⁷

²²⁰ ICANN, "ICM's Memorial on the Merits," January 22, 2009, <http://www.icann.org/en/irp/icm-v-icann/icm-memorial-on-merits-22jan09-en.pdf>, iv – v.

²²¹ ICANN, "Witness Statements and Expert Report Submitted in Support of ICM's Memorial on the Merits," January 22, 2009, <http://www.icann.org/en/irp/icm-v-icann/supporting-documentation-for-icmmemorial-22jan09-en.pdf>.

²²² ICANN, "ICANN's Response to ICM's Memorial on the Merits," May 8, 2009, <http://www.icann.org/en/irp/icm-v-icann/icann-response-for-icm-memorial-on-merits-08may09-en.pdf>.

²²³ ICANN, "Witness Statements and Expert Report submitted in support of ICANN's Response to ICM's Memorial on the Merits," May 8, 2009, <http://www.icann.org/en/irp/icm-v-icann/supporting-documentation-icann-response-08may09-en.pdf>.

²²⁴ ICANN, "Independent Review Panel Declaration," February 19, 2010, <http://www.icann.org/en/irp/icmv-icann/irp-panel-declaration-19feb10-en.pdf>.

²²⁵ *Ibid.*, 70.

²²⁶ *Ibid.*

²²⁷ *Ibid.*

The IRP noted that although there “is a measure of ambiguity in the pertinent provisions of the Bylaws,” the use of the phrase “*to declare* whether an action or inaction of the Board was inconsistent” supported an interpretation that IRP decisions were intended to be advisory, and not binding on the ICANN Board. In particular, the IRP likened this to a recommendation rather than a binding order. Moreover, the IRP also described the provision of Article IV, Section 3(15), which states, “where feasible, the Board shall consider the IRP declaration at the Board’s next meeting” as a “relaxed temporal proviso” where the Board has “to do no more than *consider* the IRP declaration.”²²⁸ Ultimately, the Board found that the loose nature of the language “emphasize[d] that [the IRP declaration] is not binding.”²²⁹ Next, the IRP determined that Independent Review is conducted *de novo* and, thus, “ICANN Board decisions do not enjoy a deferential standard of review.”²³⁰ On this point, the IRP determined that the Articles of Incorporation and Bylaws, which require, among other things, “ICANN to carry out its activities in conformity with relevant principles of international law, do not specify or imply that the International Review Process provided for shall (or shall not) accord deference to decisions of the ICANN Board.” The IRP also found that that as a California corporation, ICANN may call on the “business judgment rule” when relevant provisions in the Articles of Incorporation and Bylaws are otherwise absent.²³¹

After analyzing the events surrounding the June 1, 2005 Board decision to enter into negotiations with ICM, the IRP determined that the “reconsideration of sponsorship criteria, once the Board had found them to have been met, was not in accord with documented policy.”²³²

3.7 IRP Process Observations Based on Berkman Case Study Interviews

As previously noted, the ICM request for independent review was the first to be heard by an IRP. The case poses several questions related to the IRP process and the interpretation of the relevant sections of the Bylaws.

Given the cost and lengthiness of the IRP proceedings, several interviewees questioned whether the IRP provides an accessible and widely applicable means for reviewing the ICANN Board’s decisions. Some interviewees stated that the high cost of the proceedings meant that it offers a venue for only the wealthiest of participants and is not a viable option for the vast majority of ICANN stakeholders. Others asserted that the cost, risk, and duration of the IRP will mean that no others will be likely to appeal ICANN decisions via this mechanism, even among those with the financial resources to do so.²³³

In addition to the questions raised about limits of the IRP as an accountability mechanism, others questioned how ICANN’s interpretation of the process reflects on ICANN’s commitment to

²²⁸ Ibid., 61 (emphasis added).

²²⁹ Ibid.

²³⁰ Ibid.

²³¹ Ibid., 62.

²³² Ibid., 68.

²³³ Interviews, September and October 2010.

accountability. Some interviewees expressed the belief that ICANN's interpretation of the IRP—that the process should not entail live testimony, that ICANN should be offered deference under the business judgment rule, and that the IRP's decision should not be binding on the ICANN Board—was inconsistent with an organization with a mandate to ensure that it is accountable to its stakeholders.²³⁴

Perceptions also varied with regard to the ultimate effectiveness of the IRP as an accountability mechanism in this specific case. Some asserted that this process demonstrated accountability, given that an applicant for a new TLD was able to initiate the review process and argue their case on the merits before independent arbitrators, and in doing so compelled ICANN to defend the basis of its actions. Moreover, IRP's decision appears to have convinced ICANN to reverse its decision. Other interviewees expressed the opinion that the absence of a binding resolution from the IRP is indicative of the fundamental lack of accountability at ICANN.²³⁵

²³⁴ Interviews, September and October 2010.

²³⁵ Interviews, September and October 2010.

Appendix E: The DNS-CERT Proposal

Abstract

ICANN's DNS-CERT proposal advocates the creation of an organization to analyze, assess, and respond to global DNS security threats. This case study begins with an overview of ICANN's DNS security mandate as described in its Memorandum of Understanding with the United States Department of Commerce, its Bylaws, and its 2009 AoC. A summary of the DNS-CERT proposal follows, based on ICANN's "Proposed Strategic Initiatives for DNS Security, Stability, and Resiliency" and its "DNS-CERT Business Case." The study then traces the origins of the controversy surrounding the DNS-CERT proposal, beginning with ICANN's publication of the proposal and the remarks made in Nairobi by its CEO, Rod Beckstrom, and the controversy's development through public comments, correspondence, and material gathered in interviews with the DNS community.

The review of these materials suggests three key issues underlying the controversy: (1) the merits and clarity of ICANN's assessment of the current state of DNS security and its proposal for the creation of a centralized CERT; (2) varying interpretations of ICANN's DNS security mandate; and (3) procedural issues related to openness, transparency, public input, and stakeholder participation.

Case Study Sources and Methodology

For more information on our sources and methodology, please see Appendix A.

This case study is based on publicly available materials, including public comments, ICANN documents, academic studies, media reports, and expert opinions. It provides a summary of the facts regarding ICANN's DNS-CERT proposal. As per Exhibit B, section 1 of the Services Agreement between the Berkman Center and ICANN, its goal is to help identify key issues, challenges, and areas of disagreement related to ICANN's DNS-CERT proposal. The observations below will contribute to the Berkman team's final report.

In addition to publicly available sources, this case study includes statements, opinions and perceptions of those we interviewed in the course of developing this case. These perceptions and opinions play an important role in the interpretation of ICANN decisions and their reception by the community. The statements of interviewees do not reflect the opinions or conclusions of the study team. While we have made every effort to remove factual inaccuracies, we do not attest to the accuracy of the opinions offered by interviewees. The interviews were conducted on the condition of confidentiality.

Note: As per the Services Agreement, this case study focuses on events prior to June 17, 2010. However, the DNS-CERT proposal and related events are still evolving. As such, this study may not reflect the most recent developments in this case.

Disclosure: Professor Jonathan Zittrain, Berkman Center Faculty Co-Director and Co-Principal Investigator of this review, is on the Board of Directors of the Internet Society (ISOC). This study refers to a letter from Lynn St. Amour, President and CEO of ISOC, in establishing the factual basis of the DNS-CERT controversy.

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1 Background: ICANN's Role in DNS Security

In its original Memorandum of Understanding (MoU) with the United States Department of Commerce, ICANN was tasked with the technical management of the Domain Name System (DNS). ICANN assumed responsibility for four areas of DNS management: “stability, competition, bottom-up coordination, and representation.”¹ ICANN’s commitment to DNS stability was reflected in its original Bylaws, in which the Root Server System Advisory Committee (RSSAC) was established to “examine and advise on the security aspects of the root name server system.”²

In 2001, ICANN extended its commitment to DNS security when the Board directed ICANN’s President “to appoint a President’s standing committee on the security and stability of the Internet’s naming and address allocation systems.”³ A year later, in May 2002, the Board resolved to convert the standing committee into the permanent “Security and Stability Advisory Committee” (SSAC), which remains a cornerstone of ICANN’s DNS security efforts.⁴ The “new Bylaws,” published soon thereafter, confirmed DNS security as one of ICANN’s central organizational goals. The first of ICANN’s “Core Values,” according to the revised Bylaws, is “[p]reserving and enhancing the operational stability, reliability, and global interoperability of the Internet.”⁵

ICANN’s Affirmation of Commitments (AoC), published in September, 2009, once again reaffirmed ICANN’s commitment to DNS security. “ICANN has developed a plan,” it reads,

*to enhance the operational stability, reliability, resiliency, security, and global interoperability of the DNS, which will be regularly updated to reflect emerging threats to the DNS. ICANN will organize a review of its execution of the above commitments no less frequently than every three years. The first such review shall commence one year from the effective date of this Affirmation.*⁶

The ICANN plan for preserving DNS security, stability, and resiliency has three areas of focus: (1) general attention to physical and network security of the DNS, (2) contingency planning, and (3) “maintaining clear processes.”⁷

¹ ICANN, “Memorandum of Understanding Between the United States Department of Commerce and Internet Corporation for Assigned Names and Numbers,” November 25, 1998, <http://www.icann.org/en/general/icann-mou-25nov98.htm>.

² ICANN, “Bylaws,” November 6, 1998, <http://www.icann.org/en/general/archive-bylaws/bylaws-06nov98.htm>.

³ ICANN, “Third Annual Meeting of the ICANN Board in Marina del Ray Preliminary Report,” November 15, 2001, <http://www.icann.org/en/minutes/prelim-report-15nov01.htm#StandingCommitteeonSecurityandStability>.

⁴ ICANN, “Special Meeting of the Board Preliminary Report,” May 13, 2002, <http://www.icann.org/en/minutes/prelim-report-13may02.htm#SecurityCommittee>.

⁵ ICANN, “Bylaws,” December 15, 2002, <http://www.icann.org/en/general/archive-bylaws/bylaws-15dec02.htm>.

⁶ ICANN, “Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation for Assigned Names and Numbers,” September 30, 2009, <http://www.icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm>.

⁷ Ibid.

2 Overview of ICANN's DNS-CERT Proposal

Pursuant to the commitments described in the AoC, ICANN published a draft of its “Plan for Enhancing Internet Security, Stability, and Resiliency” in May 2009.⁸ The draft plan describes ICANN’s high-level security objectives, clarifies its role within the broader Internet security community, and provides an overview of its anticipated security-related projects for the 2009–2010 operating year—including the implementation of DNSSEC for the authoritative root zone, enhanced security measures for new gTLDs and IDNs, and active collaboration with a wide range of security stakeholders.

In December 2009, ICANN published a draft of its 2010–2013 strategic plan. The draft plan makes reference to “DNS CERT concept development” as a plan under the heading of “[p]reserve DNS stability and security,” but provides no additional detail. The final draft of the plan, published on February 22, 2010, includes a brief overview of the anticipated project:

ICANN will work in partnership with other organizations to develop an approach to the establishment of a DNS CERT in order to address one of the broader issues of Internet security. This system would enable a more coordinated and effective response to incidents and attacks on the DNS. In addition, ICANN will be working with the Internet community to enhance contingency planning and exercises to address risks and threats to the DNS.⁹

On February 12, 2010, ICANN published two additional security-related documents: the “Proposed Strategic Initiatives for Improved DNS Security, Stability and Resiliency”¹⁰ and the “Global DNS-CERT Business Case.”¹¹ Taken together, these two documents define the contours of ICANN’S DNS-CERT initiative, which aims to facilitate the creation an independent organization to anticipate, evaluate, and respond to the full range of DNS security threats.

2.1 Proposed Strategic Initiatives

The Proposed Strategic Initiatives document begins with a series of statements about the current state of DNS security. First among them is the observation that the DNS—a fundamental component of the majority of user applications on the Internet—exists “in an environment of increasing threats and risks.”¹² The increase in the “frequency and serious nature” of calls to action within the DNS security community, it argues, indicates a growing need for system-wide response capabilities. It claims that current efforts, however, are “not systemically focused.” Overall, ICANN takes the position that the DNS “lacks system-wide focal points for accountability

⁸ ICANN, “Plan for Enhancing Internet Security, Stability, and Resiliency,” May 16, 2009, <http://www.icann.org/en/topics/ssr/ssr-draft-plan-16may09-en.pdf>.

⁹ ICANN, “July 2010–June 2013 Strategic Plan,” February 19, 2010, <http://www.icann.org/en/strategic-plan/strategic-plan-2010-2013-19feb10-en.pdf>.

¹⁰ ICANN, “Proposed Strategic Initiatives for Improved DNS Security, Stability and Resiliency,” February 12, 2010, <http://www.icann.org/en/topics/ssr/strategic-ssr-initiatives-09feb10-en.pdf>.

¹¹ ICANN, “Global DNS-CERT Business Case: Improving the Security, Stability and Resiliency of the DNS,” February 12, 2009, <http://www.icann.org/en/topics/ssr/dns-cert-business-case-19mar10-en.pdf>.

¹² ICANN, “Proposed Strategic Initiatives,” 2.

related to key capabilities in risk assessment, contingency planning and exercises, and dedicated, sustained response.”¹³

The document argues that ICANN’s obligation to DNS security (as defined in the AoC and other policy documents) compels it to “ensure establishment of system-wide approaches to assess risk, to plan and exercise contingencies against potential threats and to orchestrate collaborative incident response capabilities to improve the overall security, stability and resiliency of the DNS system.”¹⁴

ICANN outlines three types of current DNS security risks: malicious activity risks (including DDoS and cache poisoning attacks), technical risks (including the DNS protocol vulnerabilities identified by Dan Kaminsky), and organizational failures (such as when a root server operator, registry, or registrar can no longer perform its function).¹⁵

The document proposes two initiatives in response to these risks. The first is a program to coordinate “system-wide DNS risk analysis, contingency planning, and exercises.”¹⁶ An expert advisory group, composed of DNS operators and the broader cybersecurity community, would oversee risk assessment and contingency planning activities. A DNS root-system information-sharing mechanism would facilitate analysis and incident response. Finally, ICANN would lead a series of multi-stakeholder exercises to identify weaknesses in current DNS security response practices.¹⁷

The second proposed initiative is the creation of a DNS-CERT organization, to serve as a central point of contact in coordinating responses to DNS security incidents. The DNS-CERT proposal is described fully in the DNS-CERT business case.

2.2 DNS-CERT Business Case

The DNS-CERT business case begins with a detailed evaluation of the current state of play in DNS security. It begins with an overview of the structure and importance of the DNS. The essential role of the DNS, it argues, has driven an increase in malicious activity aimed at disrupting or compromising the system’s security. At the same time, the increasing importance of the DNS to a range of vital applications has raised the stakes of other structural risks, such as technical and organizational failures.

Citing a report from the 2009 Global DNS Security, Stability, & Resiliency Symposium (a gathering of the global community of DNS security stakeholders held in Atlanta in February 2009), the proposal contends that “information sharing within the DNS community is sorely

¹³ Ibid., 3.

¹⁴ Ibid., 4.

¹⁵ Ibid., 4–8.

¹⁶ Ibid., 9.

¹⁷ Ibid., 9–11.

lacking” and that security response capabilities are “limited at all levels.”¹⁸ Such limitations are not necessarily due to any ineptitude or torpor within the DNS community, but rather may result from geographic constraints or limitations in resources, as well as the fact that loosely coordinated responses to security threats have, until recently, worked adequately well.

The proposal lists a series of previous DNS security incidents—including the Conficker worm, the Kaminsky vulnerability, domain hijacking, and the Avalanche attacks—to make the case that a centralized body is needed to coordinate responses to such events.¹⁹ The proposed DNS-CERT organization would meet this need. The organization would represent the interests of broad and highly diverse range of stakeholders, including DNS root operators, TLD registries and registrars, ISPs, existing CERTs, governments, vendors, and end-users.²⁰ Its mission would be the following:

*Ensure DNS operators and supporting organizations have a security coordination center with sufficient expertise and resources to enable timely and efficient response to threats to the security, stability and resiliency of the DNS.*²¹

Three goals, with accompanying objectives, would to support the mission:

1. Goal: Gain situational awareness and share information.

Objective: Establish communications means and procedures to maximum number of players; exercise regularly.

2. Goal: Improve coordination within the DNS operational community.

Objective: Enable measurement and facilitate information sharing about the health, stability and resiliency of the DNS. Engage in appropriate situations: support contingency planning and exercises; undertake After Action Reporting (AAR). Engage with DNS-OARC and RISG, among others collaborators, to leverage expertise and existing operational response capabilities related to information sharing and analysis.

3. Goal: Improve coordination with the broader security community.

Objective: Establish relationships with key partners (CERTs, security researchers, key security lists, vendors, antivirus companies, law enforcement and governments); participate in contingency planning and exercises; engage in appropriate situations; undertake After Action Reporting (AAR).²²

The proposed DNS-CERT’s core responsibilities would be to provide proactive services—including education, training, contingency exercises, and continuous monitoring of DNS health—

¹⁸ ICANN et al., “The Global DNS: Security, Stability & Resiliency Symposium: Summary, Trends, and Next Steps,” April 2, 2009, http://www.gtisc.gatech.edu/pdf/DNS_SSR_Symposium_Summary_Report.pdf.

¹⁹ ICANN, “DNS-CERT Business Case,” 7–10.

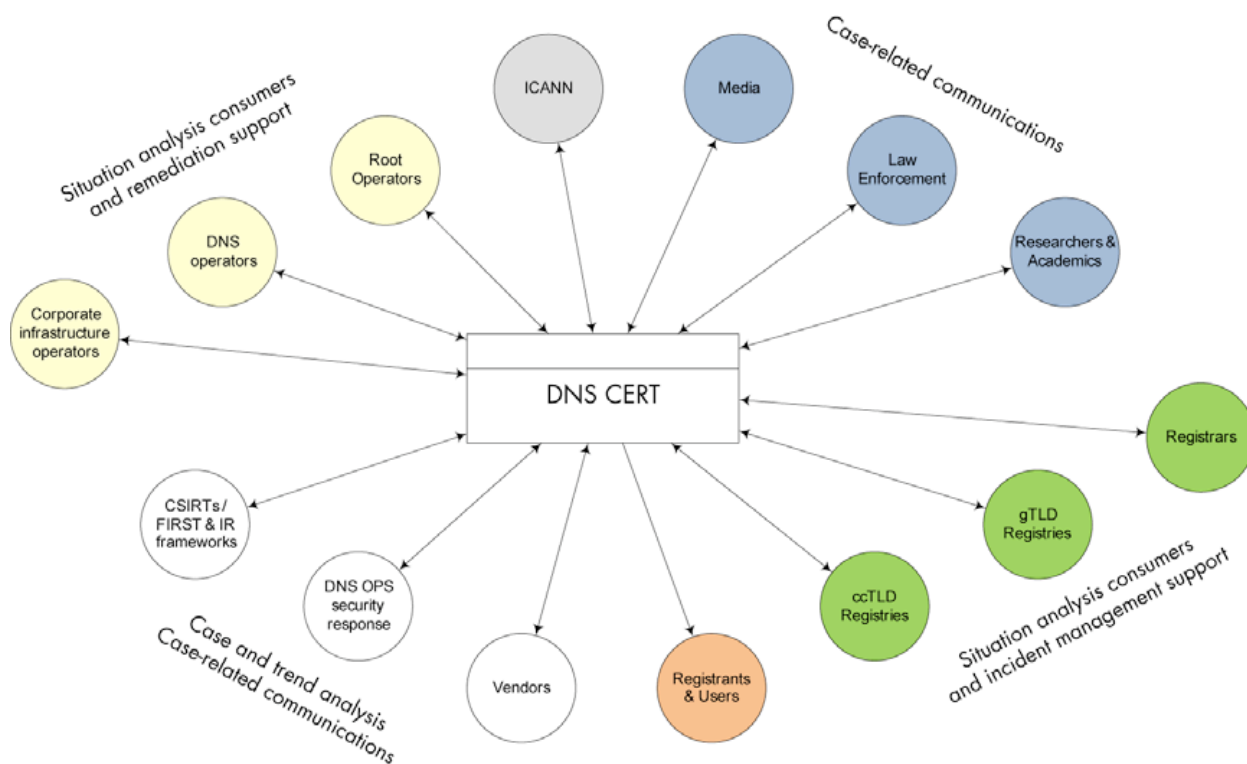
²⁰ Ibid., 9–10.

²¹ Ibid., 11.

²² Ibid., 10–11.

and reactive services, including serving as a hub for coordinating responses to DNS security incidents.²³

Although the precise relationships with constituents and stakeholders remain undefined, the proposal envisions DNS-CERT as a central node in the gathering and distribution of information about DNS security threats, which it illustrates in the following diagram:²⁴



ICANN lays out a series of steps to establish the organization, based on guidelines published by CERT/CC.²⁵ These steps—beginning with the identification of stakeholders and participants, and ending with the definition of roles and responsibilities—are described in the remaining portion of the proposal, although, as it notes, the proposal is intended as “the basis for further development of this effort through community support and feedback.”²⁶

²³ Ibid., 12.

²⁴ Ibid., 14.

²⁵ CERT/CC has published a set of guidelines for the establishment of new Computer Security Incident Response Teams (CSIRTs). See CERT/CC, “How does an organization start a CSIRT?,” http://www.cert.org/csirts/csirt_faq.html#16.

²⁶ Ibid., 15.

The document ends with a brief overview of DNS-CERT's proposed funding sources, governance model, and organizational structure. An estimated \$4.2 million annual budget is suggested for the organization, along with a staff of fifteen, a steering committee, and a Board of Governors. ICANN would serve as the project's initial sponsor "until the organization can stand on its own."²⁷ ICANN's role in the governance and operations of the proposed organization is not clearly articulated in the proposal. It reads:

Although we envisage the organization being established with initial support from ICANN, the DNS-CERT is intended to operate as much as possible as a freestanding organization, not directly dependent upon any one organization for its direction and operation. Therefore, to be successful, the DNS-CERT must be created with a governance structure that makes it accountable to key stakeholders and to the public at large.

3 Timeline: Origins of the Controversy

ICANN began formal discussions with stakeholders about the DNS-CERT proposal in December 2009 (see pp. 4–5 above), when it was first included in the draft 2010–2013 strategic plan. Although the need for an organization similar to DNS-CERT had been identified at the February 2009 DNS symposium, there was no indication of a direct role for ICANN until December 1 of that year. ICANN has indicated that ten private consultations centered on DNS-CERT occurred during the following week, with a handful more taking place in January.²⁸

The draft 2010–2013 ICANN Strategic Plan was posted for public comment on December 1, 2009 and closed on January 21, 2010.²⁹ Seven of the twenty-nine public comments received in response to the 2010–2013 strategic plan directly addressed DNS-CERT proposal.³⁰ These comments are generally supportive of ICANN's stated intention to develop a specific proposal related to DNS-CERT; the comments mainly address the overall need for better coordination in DNS security response efforts. The only openly critical comment came from Eric Brunner-Williams, who wrote:

I am concerned by the detail-free plan to copy-a-Cert....The point is, CERTs are not a given thing, they are a box into which some money and some purpose is put. We should decide how much money and what purposes, not just 'start a CERT'....If we are not careful, an 'ICANN CERT' will [be] captured, much like the ICANN SSAC function during the fast-flux hosting effort, by retail cops-and-robbers concerns that missed the fundamental issues of rapid update by registries as a fundamental tool of modern dns exploiting systems, and zero effective cost of registration, again by modern dns exploiting systems. At that point we

²⁷ Ibid., 16.

²⁸ ICANN, "Summary of Consultations and Comments related to the ICANN Global DNS-CERT Business Case," May 24, 2010, <http://www.icann.org/en/public-comment/summary-analysis-strategic-ssr-initiatives-and-dns-cert-business-case-24may10-en.pdf>.

²⁹ ICANN, "Public Comment Requested on Draft 2010-2013 Strategic Plan," December 1, 2009, <http://www.icann.org/en/announcements/announcement-01dec09-en.htm>.

³⁰ See received public comments: ICANN, "[stratplan-2010] Chronological Index," <http://forum.icann.org/lists/stratplan-2010/>.

would have a ‘CERT’ which ‘makes the suits smile’ but does us no good when competent and motivated programmers target infrastructure.³¹

ICANN published its “DNS-CERT Business Case” and its “Proposed Strategic Initiatives” for public comment on February 12, 2010. Until March 25, however, only one comment had been submitted, correcting a factual detail in the strategic initiatives document.³²

At least as far as publicly accessible materials are concerned, the DNS-CERT proposal remained largely uncontroversial until ICANN’s meeting in Nairobi in March 2010. During a joint GAC–Board meeting on March 9, the CEO of ICANN, Rod Beckstrom, conveyed a series of warnings about the health of the global DNS.³³ “What I want to share with you,” he said,

as a representative of many countries of the world is that the domain name system is under attack today as it has never been before. I have personally consulted with over 20 CEO’s of the top Registries and Registrars globally, all of whom are seeing increasing attacks and complexity of attacks and who are extremely concerned.

The domain name system is more fragile and vulnerable today than it has ever been. It could stop at any given point in time literally. It has never stopped, it has been slowed down through attacks and the Kominsky exploit that was disclosed only 18 months or so ago could have been used to fundamentally cripple the domain name system. That system is used 1 trillion times per day and your economies depend upon it. It can stop or it can materially be damaged and harmed. It is under attack. . . .

I’m sharing this because I’m gravely concerned and we need your help. So we’re going to be asking you for your advice on domain name security and on the DNS SERT and what can be done and particularly to learn the lessons from you as well. What has been accomplished in your countries?³⁴

Mr. Beckstrom’s remarks provoked strong reactions from the ICANN community. After the Nairobi meetings, ICANN extended the public comment period on the DNS-CERT Business Case and its Proposed Strategic Initiatives documents to April 14, 2010.³⁵ In total, ICANN received 13 comments on the strategic initiatives document and 25 comments on the DNS-CERT proposal. Included in the comments were formal letters from the GNSO, ccNSO, and ALAC. (See below,

³¹ Eric Brunner-Williams, “On ‘DNS-CERT concept development’ and ‘100% uptime,’” January 28, 2010, <http://forum.icann.org/lists/stratplan-2010/msg00027.html>.

³² Till Doerges, “Comment: Proposed Strategic Initiatives for Improved DNS Security, Stability and Resiliency (SSR),” February 27, 2010, <http://forum.icann.org/lists/strat-ini-ssr/msg00000.html>.

³³ ICANN, “Transcript of the GAC Board Meeting,” March 9, 2010, <http://gac.icann.org/system/files/transcript-gac-board-meeting-09mar10-en.pdf>, 26.

³⁴ This passage is copied verbatim from ICANN’s unedited transcript of the meeting.

³⁵ The original source of the request to extend the public comment deadline is unclear. The ICANN summary of the public comments cites “requests from the community” with no further detail (see below, n. 40). The first public comment submitted on the DNS-CERT business case—a joint letter from the Chairs of the gNSO, ccNSO, and ALAC—reads, “We welcome the extension of the current public comment periods on ICANN’s proposed strategic initiatives for improved DNS security, stability and resiliency and the global DNS-CERT business case document to 14 April 2010” (see above, n. 57).

“Reactions from the ICANN Community,” for an overview of the substance of commentary from the ICANN community.)

The comments generally take the form of formal input from organizations of various types. Only four individuals submitted comments. Three of ICANN’s advisory committees and supporting organizations submitted comments: ALAC, ccNSO, and gNSO. Five commercial stakeholders submitted comments: AT&T, Net Choicer, PayPal, PRESENSE Technologies GmbH, and USCIB. Governments, national CERTs, registry operators, TLD associations, and other Internet organizations submitted the remainder of the comments.

On April 6–7, ICANN hosted a private, invitation-only workshop on DNS security in Washington, D.C..³⁶ Workshop participants—comprised of representatives from various corners of the DNS security community—discussed a series of real and hypothetical DNS security scenarios in order to identify gaps in existing security response mechanisms. A draft of the findings of the workshop was posted for public comment on May 24, 2010.³⁷ The draft report includes a summary of the workshop proceedings, a list of takeaways, and a dissenting “minority report” from other workshop participants. ICANN solicited public comments on the draft report through July 2, during which it received six comments in total.³⁸

On May 24, ICANN published two additional documents related to DNS-CERT.³⁹ The first was a sixteen-page summary of public comments received in response to the strategic initiatives and the DNS-CERT business case.⁴⁰ This summary provides synopses of all public comments received, highlighting three overarching themes: (1) the need for a “deeper understanding of the threats and risks to the DNS” before a specific DNS-CERT proposal can be usefully proposed; (2) the need for more information about existing security response mechanisms and opportunities to enhance existing efforts; and (3) the view that establishing a DNS-CERT may be beyond ICANN’s mission as a technical coordinating organization.⁴¹

The second document published on May 24th was a 26-page record of ICANN’s consultations regarding DNS-CERT, divided into three areas: (1) consultations prior to the publication of the business case; (2) consultations related to the draft 2010–2013 strategic plan, of which DNS-CERT was a part; and (3) inputs received after the business case was posted for public review.⁴² The consultation record shows several private consultations with DNS stakeholders prior to the

³⁶ ICANN, “April 2010 DNS-CERT Operational Requirements and Collaboration Analysis Workshop Report,” May 24, 2010, <http://www.icann.org/en/topics/ssr/dns-cert-collaboration-analysis-24may10-en.pdf>.

³⁷ ICANN, “Public Comment: April 2010 DNS-CERT Operational Requirements & Collaboration Analysis,” May 24, 2010, <http://www.icann.org/en/announcements/announcement-24may10-en.htm>

³⁸ ICANN, “dns-collab-analysis,” May 24, 2010, <http://forum.icann.org/lists/dns-collab-analysis/>.

³⁹ ICANN, “Public Comment: April 2010 DNS-CERT Operational Requirements & Collaboration Analysis,” May 24, 2010, <http://www.icann.org/en/announcements/announcement-24may10-en.htm>.

⁴⁰ ICANN, “Summary & Analysis of Comments on the Security Strategic Initiatives and Global DNS-CERT Business Case paper,” May 24, 2010, <http://www.icann.org/en/public-comment/summary-analysis-strategic-ssr-initiatives-and-dns-cert-business-case-24may10-en.pdf>.

⁴¹ *Ibid.*, 1–2.

⁴² ICANN, “DNS-CERT Consultation record,” May 24, 2010, <http://www.icann.org/en/topics/ssr/dns-cert-consultation-record-24may10-en.pdf>.

publication of the business case, as well as seven public comments regarding the initial suggestion for DNS-CERT in the 2010–2013 strategic plan.

4 Reactions from the ICANN Community

The following sections describe three areas of the ICANN community’s reactions to the DNS-CERT proposal and Mr. Beckstrom’s Nairobi remarks: (1) issues of substance, including ICANN’s assessment of the current state of DNS security and the details of the solution it proposes; (2) the extent to which DNS security operations fall within ICANN’s mandate; and (3) issues of procedure, including openness, transparency, public input, and stakeholder participation.

4.1. Substantive Issues

The most immediate substantive issue is the CEO’s characterization of the fragility of the DNS. Many stakeholders—including participants from the Nairobi meeting—felt that ICANN’s CEO exaggerated the threats facing DNS security and understated the effectiveness of existing security response mechanisms. Two days after the meeting, for instance, Chris Disspain (on behalf of the ccNSO) published a sharply-worded letter, calling Mr. Beckstrom’s remarks “inflammatory” and “alarming.”⁴³ The next month, Lynn St. Amour wrote to the ICANN Board on behalf of the Internet Society (ISOC), stating that Mr. Beckstrom’s warning about the fragility of the DNS “has raised concern among many, yet the facts to substantiate that statement have not been made available to the community.”⁴⁴ “[M]any recognized experts in DNS security,” she wrote,

...are on record saying that they do not agree that the Internet is suddenly experiencing dramatically greater or new types of attack, or that the DNS, or the Internet itself, are likely to collapse at any moment.

Kevin Murphy at *Domain Incite* unsympathetically called the remarks “part call to arms, part Chicken Little.”⁴⁵ Mr. Byron Holland, CEO and President of the Canadian Internet Registration Authority, wrote:

*the tone of the message could be considered somewhat inflammatory....Many people in the room felt that Beckstrom was speaking out of turn and disregarding the work the community is already undertaking to ensure the stability and the security of the DNS.”*⁴⁶

Reactions to the substance of the DNS-CERT proposal—as expressed in public comments to ICANN and observations made in interviews for this case study—have varied substantially,

⁴³ ICANN, “Letter from Chris Disspain to Rod Beckstrom”, March 11, 2010, <http://www.icann.org/correspondence/disspain-to-beckstrom-11mar10-en.pdf>, 1.

⁴⁴ ICANN, “Letter from Lynn St. Amour to ICANN Board of Directors,” April 14, 2010, <http://www.icann.org/correspondence/amour-to-dengate-thrush-14apr10-en.pdf>, 1.

⁴⁵ Kevin Murphy, “Beckstrom: DNS is under attack,” *Domain Incite*, March 11, 2010, <http://domainincite.com/beckstrom-dns-is-under-attack/>.

⁴⁶ Byron Holland, “DNS-Community Emergency Response Team, or CERT,” *Public Domain*, March 26, 2010, <http://blog.cira.ca/2010/03/dns-community-emergency-response-team-or-cert/>.

ranging from cautious support on one end of the spectrum to vigorous skepticism on the other. These reactions center on two main questions: first, whether an organization such as DNS-CERT is necessary, given the current landscape of DNS security risks; and second, whether the proposed organization, as specified in ICANN's business case, is appropriately conceived.

ICANN's argument—as expressed in the Proposed Strategic Initiatives and the DNS-CERT business case, and outlined by its CEO in Nairobi—is straightforward: an increase in the frequency and complexity of attacks on the DNS has led to the need for a centralized body to coordinate proactive and reactive responses to DNS security threats. Community members, in contrast, display a range of reactions to ICANN's characterization of the risks facing DNS security as the following statements illustrate.

The Council of European National Top-level Domain Registries (“CENTR”) wrote that “ICANN should focus first on sharing information” about security threats and existing response capabilities “in order to build a common assessment of risks and weaknesses.”⁴⁷ Lynn St. Amour, quoted above, questioned whether ICANN's assessment aligned with the judgment of the DNS security community. In his response to Ms. St Amour, Mr. Beckstrom echoed the call for more information, but shifted some of the burden to the DNS community: “We have...been informed,” he writes,

*that many registries have experienced increases in botnet attacks; but none have, so far, been willing to come forth and share their data....It would be very helpful if we could work together to gather additional data on attacks on registries, and on how that information is being shared and measured on a global basis. It would greatly contribute to our joint efforts to evaluate the seriousness of the threat and coordinate our forces more effectively to meet it.*⁴⁸

Numerous community members have expressed the view in interviews and public comments, which ICANN appears to share, that further information is needed before the fragility of the DNS can be accurately assessed.

The second point of contention is whether, given existing knowledge about the threats to DNS security, a centralized DNS-CERT-like organization should be established. As ICANN's CEO made clear in his letter to ISOC, ICANN considers existing security response mechanisms to be largely inadequate: “I am not convinced that we are yet doing enough,” wrote Mr. Beckstrom, “or moving quickly enough.”⁴⁹ Many, however, expressed concern that the model ICANN describes in its DNS-CERT proposal is not an optimal approach. For instance, the Registries Stakeholder Group, in a unanimously-approved statement, argued that existing DNS security response mechanisms are well-established and often highly robust. The responses to the Conficker worm and the Kaminsky

⁴⁷ CENTR, “CENTR Comment in response to the consultation on the Domain Name System-Computer Emergency Response Team (DNS-CERT) Business Case,” March 24, 2010, http://forum.icann.org/lists/dns-cert-proposal/pdfPZE4i_GvRI.pdf.

⁴⁸ Rod Beckstrom, “Letter from Rod Beckstrom to Lynn St. Amour,” June 18, 2010, <http://www.icann.org/correspondence/beckstrom-to-st-amour-18jun10-en.pdf>.

⁴⁹ Ibid.

vulnerability, as one example, “demonstrated a very effective level of coordination, information sharing, and action.”⁵⁰ Similarly, CENTR argues in its comments that the community’s response to Conficker is

*a perfect illustration of the fact that security relies fundamentally on cooperation and collaboration amongst different experts and that’s how the current security network is build up. In such a framework different security incidents can be addressed more effective [sic] and on the long run much more efficient than with the proposed concept of a CERT focusing on one single area with potential security problem, like DNS.*⁵¹

Ms. St. Amour agrees with Mr. Beckstrom about the importance of DNS security, but, regarding the specifics of ICANN’s DNS-CERT proposal, notes that “we are concerned that the current proposals do not show convincingly that there has been a full analysis of alternate approaches.”⁵²

On the other hand, some interviewees from the cybersecurity and DNS operational communities have endorsed the idea of a centralized CERT.⁵³ Much of the impetus for the idea derived from the first “Global DNS Security, Stability, & Resiliency Symposium” of February 2009. The report from the symposium argues that

*the DNS technical, operational, and security communities are disjointed and in need of a dedicated information sharing and incident response capability. These functions are generally performed by CERTs, but no such capability exists expressly for the DNS community.*⁵⁴

Similarly, Paul Vixie, founder of DNS-OARC, has advocated publicly for the creation of a DNS-CERT organization: “We need a 24x7 monitoring and response and coordination function,” he writes, “with full time analysts looking at real time DNS events and participating in a global mesh of DNS NOCs.”⁵⁵ Although DNS security was originally a component of OARC’s mandate, Mr. Vixie writes that “Somewhere along the way we got distracted. . . . DNS-OARC was a huge undertaking, and one that I significantly underestimated.”

4.2 ICANN’s DNS Security Mandate

ICANN proposes to oversee the governance, operations, and funding (of the nontrivial \$4.2 million annual budget) of the organization “until the DNS-CERT’s initial operational capability is

⁵⁰ RySG, “Registries Stakeholder Group Statements Regarding the ‘Proposed Strategic Initiatives for Improved DNS Security, Stability and Resiliency (SSR)’ and ‘Global DNS-CERT Business Case,’” April 14, 2010, http://www.gtldregistries.org/webfm_send/79.

⁵¹ CENTR, “CENTR Comment,” 1.

⁵² Lynn St. Amour, “Letter from Lynn St. Amour to Rod Beckstrom,” 2.

⁵³ Interview, September 2010.

⁵⁴ ICANN et al., “The Global DNS Security, Stability, & Resiliency Symposium: Summary, Trends, and Next Steps,” April 2, 2009, http://www.gtisc.gatech.edu/.../DNS_SSR_Symposium_Summary_Report.pdf.

⁵⁵ Paul Vixie, “Perspectives on a DNS-CERT,” March 12, 2010, <http://www.isc.org/community/blog/201003/perspectives-dns-cert>.

achieved.”⁵⁶ However, the proposal does not stipulate how ICANN will determine when this capacity has been reached; in addition, the permanent structure of the organization’s governance, operations, and funding remain undefined.

Many community members have rejected the idea of ICANN playing an operational role in DNS security. In a joint letter, the gNSO, ccNSO, and ALAC wrote that “In general terms, ICANN plays a coordinating, non-operational role in managing Internet naming and numbering resources. However, we are concerned that, in this particular case, ICANN’s proposed role remains unclear.”⁵⁷ Ms. St. Amour writes, “we continue to be concerned that ICANN may be broadening out from its principle mandate as coordinator of the global resource that is the domain name system into the management of new and peripheral operational functions.”⁵⁸ The Registries Stakeholder Group provides a similar argument:

*ICANN points to its Bylaws and the Affirmation of Commitments (AoC) to define its responsibility to ensure the stable and secure operation of the Internet’s unique identifier systems. In general terms, ICANN plays a coordinating, non-operational role in managing Internet naming and numbering resources. However, in the SSR and DNS-CERT documents, ICANN’s proposed role seems both unclear and over-broad. The RySG shares the concern already voiced by some in the community that ICANN’s role in these potential initiatives and undertakings not cross over into an operational capacity. ICANN should undertake activities that are consistent with its limited technical coordination role. There should be a systematic examination of that role in relation to the SSR and DNS-CERT, using existing community processes. ICANN must be able to explain its remit and work within it, rather than expanding its mission to meet unrealistic or uninformed expectations, or into areas best filled by other entities.*⁵⁹

The Registries Stakeholder Group points to the third of ICANN’s core values, as stated in the ICANN Bylaws, to substantiate its argument that ICANN should avoid playing an operational role wherever possible.⁶⁰ This core value is:

*To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties.*⁶¹

The concerns regarding ICANN’s DNS security mandate may also stem from uncertainty surrounding its intentions. One interviewee described DNS security as an issue on which ICANN has “real legitimacy” and an area where it could successfully facilitate a bottom-up decision-making process among its full range of stakeholders. Lack of clarity regarding ICANN’s

⁵⁶ ICANN, “DNS-CERT Business Case,” 15–16.

⁵⁷ gNSO, ccNSO, and ALAC, “Joint letter from Chairs of the gNSO, ccNSO and ALAC,” March 25, 2010, <http://gnso.icann.org/correspondence/chairs-letter-re-dns-cert-25mar10-en.pdf>.

⁵⁸ Lynn St. Amour, “Letter to Rod Beckstrom,” 2.

⁵⁹ RySG, “Registries Stakeholder Group Statements,” 2.

⁶⁰ RySG, “Registries Stakeholder Group Statements.”

⁶¹ ICANN, “Bylaws,” Section 2.3.

motivations, however, has made the DNS-CERT proposal “feel like a land grab,” causing a “missed opportunity” in the realm of DNS security, according to this interviewee.⁶²

The ambiguity surrounding ICANN’s role in the proposed organization is displayed in the ICANN CEO’s letter to ISOC. “[W]e have never proposed that ICANN should be the operator of such a CERT,” he wrote, “but rather have asked the community for their view on the proposal that such a global DNS CERT should be established.”⁶³ In the same paragraph, however, he wrote, “I think that ICANN should probably have a role in the operation of such a CERT, if required by the community, but in any case, we look forward to the continuing discussions.” The DNS-CERT business case does not clearly describe whether ICANN should be the operator or merely have a role in the operation of the CERT.

4.3 Procedural Issues

The review of a diverse set of publicly available materials (see above), as well as a series of interviews, suggests that the root of the DNS-CERT controversy is—to varying degrees—attributed to factors such as limited transparency in the development of the DNS-CERT proposal, the perceived absence of opportunities for public input prior to the publication of the detailed business case, and the apparent lack of adequate prior consultation with the community of DNS security stakeholders.

4.3.1 Openness and Transparency

As the above reactions indicate, a perceived lack of openness appears to have fueled additional concerns. Reportedly, DNS stakeholders were not informed that Mr. Beckstrom would be making any remarks related to DNS security issues prior to the Nairobi meeting.⁶⁴ This claim is supported by the fact that DNS security was not mentioned on the GAC meeting agenda.

ICANN’s CEO opened his remarks with the claim that he had “personally consulted with over 20 CEO’s of the top Registries and Registrars globally.” As one interviewee noted, however, Mr. Beckstrom has refused to disclose the names of the registry and registrar members with whom he consulted. Furthermore, ICANN has conducted surveys within governments about DNS security issues, unbeknownst to members of the DNS communities within those countries.⁶⁵ As Mr. Disspain expressed in his letter from March 11, 2010, the Nairobi remarks have, to varying degrees, undermined the credibility of ccTLD operators on DNS security issues in the eyes of governments, implanting unnecessary barriers to DNS policy goals. One interviewee suggested that ICANN’s handling of the process led to the demise of an idea that otherwise carried a good amount of legitimacy and may have led to productive collaborations between ICANN and the DNS security community.⁶⁶

⁶² Interview, September 2010.

⁶³ Rod Beckstrom, “Letter to Lynn St. Amour,” 2.

⁶⁴ Interview, September 2010.

⁶⁵ Interview, September 2010.

⁶⁶ Interview, September 2010.

Several public comment submissions expressed similar concerns about a general lack of openness and transparency throughout the DNS-CERT process, generating confusion and mistrust about ICANN's intentions.

4.3.2 Public Input and Stakeholder Participation

Interviews and public materials have raised the issue of the degree to which ICANN solicited and addressed input from DNS security stakeholders and the public at large during the DNS-CERT process. Mr. Disspain, for instance, wrote:

Our concerns lie not with your focus on security issues, but with your precipitated unilateral analysis of such an important issue and the public and inflammatory manner by which your views have been communicated.

We agree that, as CEO of ICANN, it is your responsibility to address these issues, but it is equally your responsibility to do so through ICANN's bottom-up, consensus-based multistakeholder model. It is also the responsibility of those in positions of influence within ICANN to show due care when making statements on complex, cross-cutting issues to ensure effective analysis and stakeholder engagement without unnecessary confusion or concern.⁶⁷

Ms. St. Amour echoes Mr. Disspain in expressing “strong concerns” about the means by which the DNS-CERT proposal was developed, arguing that ICANN has failed to demonstrate a commitment to “open, freely accessible, multi-stakeholder, and knowledge-based processes.”⁶⁸ In addition to a lack of stakeholder involvement, Ms. St. Amour also contends that ICANN's security-related proposals:

do not show convincingly that there has been a full analysis of alternate models. ISOC believes that the proposals have been put forward prematurely—without the full backing of the supporting organizations and advisory committees in ICANN, nor with the broader community, including the technical community.⁶⁹

At the *Internet Governance Project*, Milton Mueller blogged:

One moral of this story is that there is still a residue of suspicion within the traditional internet technical community about ICANN and its ambitions. Another is that an ICANN CEO who challenges them or who makes them look as if they aren't doing their jobs right will have hell to pay.

One interviewee commented that “ICANN's openness is commendable,” referring particularly to the public comment period for both the “Proposed Strategic Initiatives” and the “DNS-CERT Business Case” and ICANN's willingness to extend the deadline at the public's request. The

⁶⁷ Chris Disspain, “Letter from Chris Disspain to Rod Beckstrom.”

⁶⁸ *Ibid.*, 2.

⁶⁹ *Ibid.*

interviewee expressed concern, however, that ICANN “hasn’t done much to show that it’s responsive to input from the public.”⁷⁰

Some DNS stakeholders have expressed strong concern about the lack of opportunities to participate prior to the Nairobi meeting. For instance, the ccNSO’s letter to the ICANN CEO reads:

*Although ICANN’s DNS-CERT business plan acknowledges existing security stakeholders such as CERT/CC and the CERT network, FIRST and DNS-OARC and other involved parties such as RIRs, DNS Root Operators, registrars and ccTLD and gTLD registries, little effort appears to have been made to engage these groups in developing the DNS-CERT proposal. This lack of dialogue leads to the potential for duplication of efforts and confusion, rather than clarification, of specific roles and responsibilities.*⁷¹

Interviews and written submissions by ICANN staff solicited for this case study offer a markedly different perspective on the opportunities for input and stakeholder involvement during the development of the DNS-CERT proposal. ICANN staff point to a long series of consultations and public submissions dating to early 2009, during which they consulted with numerous networking and security experts (see Appendix 1 for a timeline and references). In the 2009 DNS symposium held in Atlanta, participants explicitly identified the need for a centralized CERT-like coordinating body. The report from the 2010 DNS symposium, however—which occurred prior to the Nairobi meeting—took a more measured position, emphasizing above all the need for further research and information-sharing before a specific program could be proposed.

ICANN’s consultation records show that, prior to the Nairobi meeting and the publication of the DNS-CERT proposal, participation from the ICANN community at large was minimal. ICANN consulted with a range of DNS security stakeholders, but the majority of interactions with the DNS community took place in private consultations. The draft 2010–2013 strategic plan suggests the creation of a DNS-CERT project, but offers no details to which the public could respond.

After Nairobi, many stakeholders continued to be dissatisfied with the lack of opportunities to participate.⁷² ICANN’s April 6–7 workshop in Washington, D.C. aimed to convene a range of participants from the DNS security community specifically to share information and identify the gaps in current DNS security measures. However, the workshop was held privately, and fewer than thirty participants were invited,⁷³ causing some to view the workshop with skepticism rather than enthusiasm.

⁷⁰ Interview, September 2010.

⁷¹ ccNSO, “Comments on ICANN DNS-CERT Proposal,” 1.

⁷² Interview, September 2010.

⁷³ ICANN, “April 2010 DNS-CERT Operational Requirements and Collaboration Analysis Workshop Report” (see the list of participants at the end of the report).